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No. _____

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1988

AMOS E. REED,

Petitioner,

v.

GUENTER MANNHALT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH O. EIKENBERRY
Attorney General

CHARLES S. FADDIS
Assistant Attorney General

Department of Corrections
Mail Stop: FZ-11
Olympia, WA 98504
(206) 586-1445

STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

QUESTIONS PRESENTED

1. Whether the Ninth Circuit Court of Appeals' decision, which reversed a defendant's state court convictions on the basis that an alleged conflict of interest between the defendant and his attorney violated his Sixth Amendment right to effective assistance of counsel, conflicts with controlling appellate decisions of the United States Supreme Court, other federal Circuit Courts of Appeal and the Washington Supreme Court, all of which require defendants to factually demonstrate an "actual conflict" "adversely affecting" the attorney's performance.

2. Do *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and *Strickland v. Washington*, 466 U.S. 668 (1984), permit lower courts to adopt a per se rule which establishes the existence of an actual conflict of interest whenever a defendant shows, without more, that his attorney was accused of crimes similar or related to his own?

3. Under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and *Strickland v. Washington*, 466 U.S. 668 (1984), may a court considering a Petition for Writ of Habeas Corpus dispense with a factual consideration of whether a *potential* conflict of interest between an attorney and his client ever became an *actual* conflict?

4. When seeking post-conviction relief by Writ of Habeas Corpus, may a defendant obtain a reversal of his conviction(s) by showing *only* that his attorney's trial tactics *may have been* motivated in part by his own interests, and that those tactical choices *may have been* adverse to the defendant?

5. May a defendant obtain reversal of his conviction(s) on a claim of conflict of interest by his attorney, without showing that the attorney *actively* represented interests contrary to his own, and that the attorney's representation thereby *actually* was affected adversely?

LIST OF PARTIES

The parties to the proceeding below were: Petitioner, Amos E. Reed, the former Secretary of the Washington Department of Corrections, who was aligned as the Respondent-Appellee below, and Respondent, Guenter Mannhalt, an inmate currently serving several life terms at the Washington State Penitentiary in Walla Walla, Washington, who was aligned as the Petitioner-Appellant below.

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FOR THE NINTH CIRCUIT

The Petitioner, Amos E. Reed, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on May 25, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit appears as Appendix A hereto.

JURISDICTION

The Court of Appeals for the Ninth Circuit entered a Judgment and Order on May 25, 1988 reversing the District Court's grant of Summary Judgment to Petitioner,

Amos E. Reed, granting Respondent, Guenter Mannhalt's Motion for Summary Judgment and remanding the case to the District Court for the granting of a conditional Writ of Habeas Corpus. This ruling, which will vacate Mr. Mannhalt's convictions and release him from confinement, has been stayed pending the submission of this Petition for Certiorari.

Petitioner, Amos E. Reed, invokes this Court's jurisdiction to review the judgment of the Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

> Sixth Amendment to the United States Constitution. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

On October 17, 1980, the Whatcom County, Washington, Sheriff's Office served a search warrant on the premises of the International House of Donuts, Respondent Guenter Mannhalt's place of business in Seattle, King County, Washington. CR 34, p. 4. The execution of that search warrant triggered intense police efforts in both Whatcom and King Counties to exploit the evidence seized from Mannhalt's safe and the basement of his business.

The Whatcom County effort eventually led to the charging of Mannhalt and several of his employees and associates with drug trafficking, burglary and possessing stolen property crimes. All but Mannhalt were convicted. CR 34, pp. 5-7. Mannhalt was acquitted by a jury following a trial in which he was represented by James Kempton, the Seattle attorney who represented him as well in his King County prosecution. CR 34, p. 7; CR 47, pp. 1, 16. The

"effectiveness" of Kempton's subsequent representation of Mannhalt in the King County prosecution is the sole issue in this Petition.

The Seattle Police Department formed a task force of officers and detectives to evaluate and pursue information being supplied by two of Mannhalt's employees following their arrests in Whatcom County. (Evans Deposition, p. 10). These employees, Eric Taa and Sam Kline, described for authorities a loose knit group of Mannhalt's employees and associates who, using the basement of his business as a base of operations, had committed numerous armed and strongarm robberies, burglaries of commercial and private premises, car prowls and assorted other crimes. Taa and Kline identified some of the items seized from Mannhalt as the fruits of specific crimes (jewelry, bank bags, etc.), identified other items as the tools and implements used to commit the crimes (handguns, handcuffs, gloves, satchels, etc.), and in many cases identified the persons who had committed the crimes. (Evans Deposition, pp. 6-16).

In some cases, the task force was successful in obtaining sufficient independent corroboration of Taa and Kline's information to arrest, and subsequently to charge, the identified perpetrators. Three such persons, Dale Sheeler, Tommy Morris and Jeff Counts, also eventually cooperated with authorities, identifying additional perpetrators, fruits and implements of yet more crimes, and also testifying as witnesses for the state in Mannhalt's King County trial. (Evans Deposition, p. 21).

The task force's efforts solved numerous property crimes in and around Seattle, and produced armed robbery charges against eight people, not including Mannhalt, involving over twenty-two specific armed robberies. (Evans Deposition, p. 43). Additionally, Mannhalt was charged in late December, 1980, with seventeen felony counts, including criminal conspiracy, multiple armed robberies as an accomplice, and five counts of possessing stolen property.

During the task force's exploitation of Taa and Kline's information, evidence was developed linking

Tommy Morris, a long time friend and associate of Mannhalt, to several armed robberies. Following his arrest in November, 1980, Morris told police he could supply information concerning multiple crimes directly or collaterally involving Mannhalt. He supplied police with a list of twelve crimes about which he was willing to talk. CR 27, p. 4. Item #11 on the list stated that:

> Attorney James Kempton purchased a stolen ring $1200 with $100 bills; taken from Lake Washington area. Also purchased a stolen bracelet.

Mannhalt was charged with the seventeen felony counts on the basis of the physical evidence and the prospective testimony of others *before* Morris became a cooperative witness obligated to testify for the state. (Evans Deposition, p. 32). Nevertheless, the task force had pursued all the items on Morris' list. Some items were corroborated by information obtained from other sources and related to crimes for which Mannhalt was tried. (Evans Deposition, p. 34, pp. 37-45). Some could not be corroborated. Despite a special request by the state prosecutor advising the task force either "to charge or to exonerate" Kempton, and the task force's efforts to do so, no corroboration whatsoever was developed concerning item #11. (Evans Deposition, p. 43).

Consequently, after Mannhalt had been formally charged and Kempton had entered an appearance as his attorney, and after Morris has become an endorsed witness for the state, the prosecutor, in light of the potential conflict of interest between Kempton and his client, interviewed Morris to determine the precise basis for his accusation of Kempton. (Evans Deposition, p. 46). That interview revealed that Morris had no direct evidence of the transaction but instead had been relating what he had been told by Mannhalt. (Evans Deposition, p. 47). Because of the task force's success in corroborating similar, equally vague bits of information, and the disclosure that the source of the information was Mannhalt himself, the prosecutor evaluated item #11 as unfounded, unusable and probably untrue. (Evans Deposition, pp. 48-52). Immedi-

ately after that determination and well before trial, the prosecutor provided Kempton with discovery of all of Morris' prior statements, including the twelve items disclosed to police, told him that an unsuccessful effort had been made to corroborate the allegation concerning him, and that he was no longer suspect. (Redkey Deposition, pp. 48-53, 63-64); (Evans Deposition, p. 55); CR 20, p. 2; CR 45; CR 7.

The prosecutor initially was "terribly interested" in Morris' information concerning Kempton, (Evans Deposition, p. 42), and even would have considered some sort of "deal" with Mannhalt had that information been independently corroborated. (Evans Deposition, pp. 43, 64-65). However, since it was not corroborated, there never was a basis for such a deal. (Evans Deposition, pp. 48, 64-65); (Redkey Deposition, pp. 29-31, 33).

Kempton had purchased a gold watch from Mannhalt, his longtime client, sometime prior to these events. According to Mannhalt, Kempton paid $1200 for the watch, CR 34, p. 3. According to Kempton, he paid $1000 for the gold watch in installments of $500 after having it appraised at approximately $1000 wholesale value. CR 45, pp. 6-7.

Mannhalt's trial began the first week of May, 1981, and ended on June 16, 1981 with jury verdicts finding him guilty of criminal conspiracy, guilty of counts of Robbery in the First Degree, and guilty of counts of Possessing Stolen Property. The jury also found him not guilty of four counts of Robbery in the First Degree and of one count of Possessing Stolen Property. Over sixty witnesses testified in the state's case, including the five former employees or associates, Taa, Kline, Sheeler, Morris and Counts. The physical evidence identified by these witnesses, over seventy exhibits, included firearms obtained from Mannhalt used to commit the robberies, gloves, handcuffs and other items used in their commission, articles of jewelry and other valuables taken from the victims during the robber-

ies, and various other items found in Mannhalt's possession which were taken during other robberies or burglaries.

Kempton aggressively cross-examined the five accomplice witnesses, exposing inconsistencies within their testimony and essentially accusing each of them of lying to obtain a better sentence for the crimes they admittedly had committed. Transcripts: Taa, Kline, Sheeler, Morris and Counts. His cross-examination of Morris was no exception to this pattern. It was, however, marked by an incident relied upon by the Ninth Circuit in reversing Mannhalt's convictions.

During this cross-examination, Kempton confronted Morris with his accusation that Kempton had purchased a stolen ring and bracelet from Mannhalt. At one point, he requested a female spectator, presumably his wife, to display her jewelry and challenged Morris to identify it. CR 26, Appendix C. Morris' response to this confrontation was non-responsive, evasive, contradictory and sometimes flippant, but he nevertheless persisted in his allegation. CR 26, Appendix C, pp. 104-110. This confrontation was a deliberate, planned strategy to discredit Morris by demonstrating that he was willing to accuse anyone to "save his skin". The strategy was undertaken only after extensive consultation between Kempton, his associate Debra Youngblood and Mannhalt, Cr 45, pp. 9-11; CR 27, pp. 3-5; CR 34, pp. 5-6, and was adopted in hopes of totally discrediting Morris through the cross-examination. CR 45, pp. 13-14.

Mannhalt called twenty-four witnesses in his defense and testified himself for two and one-half days. CR 34, p. 7;. Kempton's examination of Mannhalt was meticulously prepared and exceedingly thorough. He questioned him about every aspect of the evidence so far received, and went so far as essentially to cross-examine his own client on many of his assertions. The examination in fact was so far reaching and thorough that the prosecution elected not to cross-examine Mannhalt. CR 34, pp. 6-7. During his examination, Kempton did not ask Mannhalt whether he had sold him a stolen ring or bracelet as described by Mor-

ris. CR 45, p. 15. Kempton explained this omission as follows:

> We discussed this (not questioning Mannhalt regarding the alleged sale of the ring) prior to Guenter taking the stand, and we both agreed as did Ms. Youngblood, that Tommie Morris was so absolutely discredited in the eyes of the jury, that we had laid the alleged stolen ring purchase to rest and it needed no further comment.
>
> Neither Mr. Mannhalt, my associate Ms. Youngblood, nor myself felt we needed any further efforts to refute Tommie's accusation because we were all confident that the jury did not believe one word he had said on any subject.

CR 45, p. 15. Both prosecutors agreed with that assessment. Prosecutor Redkey stated that the cross-examination of Morris was effective, that Morris "looked like a liar" (Redkey Deposition, p. 47), and thought it had been a "good tactic" to pit Morris' credibility against Kempton's, because "Kempton won the battle. He discredited Tommy Morris, who didn't need a lot of discrediting * * *" (Redkey Deposition, pp. 54-55). Prosecutor Evans believed that Kempton had capitalized on the ring accusation to further discredit Morris.

> "Morris was not a very good witness, and when Kempton started cross-examining him, he got angry, he got hot, he got reckless * * * Jim was totally in control of himself. He knew what he was doing. I am convinced, for whatever it is worth, this was planned capitalization on *Brady* materials by a wily, old attorney. He knew I couldn't do anything about it, and he capitalized on it for his client. That's what I think and I thought at the time." (Evans Deposition, pp. 59-60).

The jury also agreed with this assessment of Morris. After the trial, two of the jurors told the prosecutor and Ms. Youngblood that the jury had disregarded entirely Morris' testimony, and had required consistent accounts by at least two other accomplices to convict on any count. (Evans Deposition, pp. 67-68). That account of the jury's disregard of Morris' testimony is objectively supported by an analysis of the jury's findings. *See* Table, Appendix E.

On each of the not guilty counts, Morris' testimony was corroborated by only one robber-witness. By contrast, on each of the guilty counts, Morris' testimony was corroborated by at least two additional robber-witnesses. CR 48, p. 13. In other words, the jury disregarded Morris' testimony entirely, while still requiring two consistent accounts to convict on any count.

On September 18, 1981, Mannhalt was sentenced to concurrent life terms of imprisonment on all the Robbery in the First Degree counts, and lesser concurrent terms on the remaining convictions. *See*, Appendix B. CR 1.

After sentencing, Mannhalt's trial counsel, James Kempton, filed a timely Notice of Appeal to Division I of the Washington Court of Appeals, raising issues pertaining to the search and seizure of evidence, the issuance of the search warrant, and denial of Mannhalt's request to immunize a witness. Mannhalt's convictions were affirmed by the Washington Court of Appeals in a reported decision, *State v. Mannhalt*, 33 Wn. App. 696, 658, P.2d 15 (1983).

Following the court's affirmance of his convictions, Mannhalt retained new counsel who substituted for Kempton and petitioned the Supreme Court of Washington to grant review of the decision of the Court of Appeals. In addition to the issues previously raised, Mannhalt also raised, for the first time, his claims of conflict of interest and ineffective assistance of counsel. His Petition for Discretionary Review in the Supreme Court was denied by order of the court commissioner dated April 3, 1985. *State v. Mannhalt*, 100 Wn.2d 1024 (1984).

Mannhalt next filed a Personal Restraint Petition in the Washington Court of Appeals, supplementing the record and raising the same issues asserted unsuccessfully in the Petition for Review in the Washington Supreme Court, described above. That Petition was filed April 11, 1984, and was denied by an unpublished decision of the Court of Appeals dated November 26, 1984. *In re Mannhalt*, 39 Wn. App. 1004 (1984). Mannhalt then sought review of the denial of his Personal Restraint Petition in the Washington Supreme Court. His Petition for Review was denied by

order of the Supreme Court dated April 3, 1985. *See* Appendix C. This exhausted all of Petitioner's state court remedies.

Following these state court proceedings, Mannhalt filed a Habeas Corpus Petition pursuant to 28 U.S.C. § 2254 in the United States District Court for the Western District of Washington. CR 1. The parties commenced discovery with permission of the court, which included the Depositions of Duane Evans and William Redkey, the state court prosecutors in Mannhalt's trial. Affidavits of Mannhalt's defense counsel, James Kempton and Debra Youngblood were submitted, as was an Affidavit by Mannhalt himself. Transcripts of the testimony of Taa, Kline, Sheeler, Morris and Counts were also submitted, as was a transcript of Mannhalt's trial testimony. On June 4, 1986, the state filed a Motion for Summary Judgment, and Mannhalt filed a Cross-Motion for Summary Judgment on September 15, 1986. CR 8; CR 25.

On June 1, 1987, the Honorable Barbara Rothstein, United States District Court Judge, issued an order which granted the state's Motion for Summary Judgment, and denied Mannhalt's Summary Judgment Motion. *See*, Appendix D, CR 51. A judgment denying the Petition for Writ of Habeas Corpus was finally entered on July 20. 1987, and an appeal to the Court of Appeals for the Ninth Circuit was taken. CR 55.

Mannhalt filed his opening brief on November 5, 1987. Then Respondent Amos E. Reed, filed his response brief on December 8, 1987. Oral argument was conducted on April 6, 1988, before a three judge panel of the Ninth Circuit in Seattle, Washington. On May 25, 1988, the Court of Appeals for the Ninth Circuit issued its opinion reversing the decision of the district court and directly contradicting the determinations of the state appellate courts. *See* Appendix A. Relief is sought from that decision.

SUMMARY OF ARGUMENT

This Court should grant relief from the decision of the Circuit Court of Appeals for the Ninth Circuit. That decision, which reversed the convictions of a state court defendant on grounds of a conflict of interest by trial counsel, departed significantly from the test for judging whether a conflict violated the Sixth Amendment set out in *Cuyler v. Sullivan*, 446 U.S. 335 (1980) and *Strickland v. Washington*, 466 U.S. 668, 674 (1984).

In a novel application of that test, the Court of Appeals held, as a matter of law, that an "actual conflict" was established by the mere showing that trial counsel has been accused of a crime similar or related to those of his client, and, disregarding the most significant evidence and the findings of the District Court, found "adverse" effects on counsel' performance by merely speculating on (1) the motivation for several tactical decisions by counsel, and (2) the impact of those decisions on his representation of his client.

In the course of its decision, the court adopted a highly critical and intrusive attitude in its review of counsel's conduct, ignored a significant body of evidence that demonstrated that the interests of counsel and his client never diverged, treated as irrelevant the fact that the client was consulted and had approved in advance the questioned tactical choices, and rejected counsel's plausible, professionally reasonable explanation for the choices. The court also rejected without authority the decision of the Supreme Court of Washington prohibiting counsel's potential testimony as impeachment on a collateral matter.

This strained, result-oriented decision by the Court of Appeals disregards the binding pronouncements of this Court in *Cuyler* and *Strickland, supra*, and conflicts with decisions of other Circuit Courts of Appeal and with the Supreme Court of Washington.

This Court, therefore, should accept review, not only to rectify an erroneous decision in contravention of this Court's pronouncements and in conflict with other appellate courts, but also to provide lower courts firm guidance

and clearer standards in this oft-litigated factual context, post-conviction relief, as it recently did in the pretrial setting in *Wheat v. United States*, ____ U.S. ____, 108 S. Ct. 1692, ____ L.Ed.2d ____ (1988).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals for the Ninth Circuit erroneously adopted a blanket rule that a conflict of interest automatically exists whenever an attorney is accused of crimes similar or related to those of his client. This rule is in direct conflict with the state of the law in the other federal circuits, the decision in this case of the Washington Supreme Court and the pronouncements of the United States Supreme Court.

The Court of Appeals for the Ninth Circuit based its decision upon a blanket presumption that whenever an attorney is accused of crimes similar or related to those of his client, an actual and irreconcilable conflict of interest always exists. The establishment of such a presumption runs counter to the clear direction that case by case factual analysis must be carried out to determine whether a conflict exists. *Strickland v. Washington*, 466 U.S. 668 (1984). The Ninth Circuit's resolution skews the entire inquiry dramatically in favor of the criminal accused, far out of proportion to any legitimate need.

The Ninth Circuit's decision also places it in direct conflict with the prevailing law in the other federal circuits.

> "We will not find an actual conflict unless appellants can point to 'specific instances in the record to suggest an actual conflict or impairment of their interest' * * * Appellants must make a factual showing of inconsistent interests and must demonstrate that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other. If he did not make such a choice the conflict remained hypothetical."

United States v. Mers, 701 F.2d 1321, 1328 (11th Cir. 1983); *In accord Smith v. White*, 815 F.2d 1401 (11th Cir. 1987); *United States v. O'Malley*, 786 F.2d 786 (7th Cir. 1986); *Oliver v. Wainwright*, 782 F.2d 1521 (11th Cir. 1986); *United States v. Fahey*, 769 F.2d 829 (1st Cir. 1985); *Government of Virgin Islands v. Zepp*, 748 F.2d 125 (3rd Cir. 1984); *United States v. Ard*, 731 F.2d 718 (11th Cir. 1984); *United States v. Alvarez*, 696 F.2d 1307 (11th Cir. 1983); *United States v. Knight*, 680 F.2d 470 (6th Cir. 1982); *United States v. Hearst*, 638 F.2d 1190 (9th Cir. 1980); *United States v. Alvarez*, 580 F.2d 1251 (5th Cir. 1978).

In support of its ruling, the Court of Appeals cited two decisions from other federal circuits. *United States v. Cancilla*, 725 F.2d 867, 870 (2nd Cir. 1984). *United States v. Salinas*, 618 F.2d 1092, 1093 (5th Cir. 1980). The facts in *Cancilla*, however, were most unusual and precluded the court from making the factual inquiry mandated by *Cuyler*. After Cancilla's conviction, the government advised the court by affidavit that it had learned that Cancilla's trial counsel may have conspired with someone connected to the Cancilla scheme. The government refused to reveal the underlying details of the allegation, requested that the court *assume* that counsel had committed crimes with possible co-conspirators of Cancilla similar to those for which Cancilla was on trial, and requested the court *to assume* that counsel had labored under a "most egregious" conflict of interest while defending Cancilla. *Cancilla*, 725 F.2d at 868. Predictably, the court did make the requested assumptions.

The court in *Salinas* was concerned with a completely different issue; whether a trial judge had abused his authority in disqualifying a defense counsel based on a perceived conflict of interest.

More importantly, the Court of Appeals' decision in this case is in direct conflict with the decisions of the United States Supreme Court. This Court has repeatedly stated that, "[t]he possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a

violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 347, 351 (1980).

Significantly, in *Cuyler*, the Supreme Court overturned the establishment of a presumption that a conflict of interest existed in cases of multiple representation. The creation of such a presumption by the 3rd Circuit was deemed error. It was in this context that the Supreme Court enunciated the rules governing conflict of interest allegations.

Furthermore, this Court has declared its adamant opposition to blanket rules and presumptions in the context of ineffective assistance of counsel allegations.

> "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant."

Strickland v. Washington, 466 U.S. 668, 690 (1984). The Court of Appeals for the Ninth Circuit has acted in direct contravention of this principle, bypassed the necessity for a demonstration of an actual conflict and declared that a conflict will simply be presumed to exist.

2. The Court of Appeals for the Ninth Circuit erroneously presumed prejudice from the mere showing of a conflict of interest without requiring the Appellant to demonstrate an actual adverse impact upon his attorney's performance at trial. Such a presumption is in direct conflict with the clear direction of the United States Supreme Court. *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the decision of the Washington Supreme Court in the case at bar and the state of the law in the other federal circuits.

"Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' *and that* 'an actual conflict of interest adversely affected his lawyer's performance.' " *Strickland*, 466 U.S.

at 692 quoting *Cuyler* 446 U.S. at 348, 50. (Emphasis added).

The Court of Appeals for the Ninth Circuit dispensed with this requirement for the demonstration of an adverse impact. The court simply compiled a list of several possible or potential impacts and halted its inquiry at that stage. In the court's own words:

> "(1) Kempton's personal interest in preserving his reputation and avoiding criminal prosecution *may have* impacted the manner of the cross-examination;
>
> (2) Kempton's personal feelings about Morris' allegations *may have* thus adversely affected his performance;
>
> (3) Kempton's decision not to question Mannhalt thus *may have been* affected by Kempton's personal concerns; and
>
> (4) [Kempton] *may not have* pursued a plea bargain in which Mannhalt would agree to testify against Kempton."

See, Appendix A, pp. 5934-35. [Emphasis added.]

Even in its summary, the court conceded that Mannhalt had not shown that Kempton's performance *had been* affected adversely. Instead, the court characterized that showing as having demonstrated that Kempton's performance was "likely affected". *See*, Appendix A, p. 5937.

The Court of Appeals also exhibited a highly critical and intrusive attitude toward its review of defense counsel's conduct, again, in direct contravention of the direction of the United States Supreme Court.

> "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable * * * a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsights, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time * * * there are countless ways to provide effective assistance in any

> given case. Even the best criminal defense attorneys would not defend a particular client in the same way."

Strickland, 466 U.S. at 689.

In cataloging its list of hypothetical conflicts the Court of Appeals also disregarded entirely much of the most significant evidence in the case at bar. In many cases, this evidence was of such magnitude that it demonstrated conclusively that certain theoretical conflicts were not even hypothetically possible, and yet was dismissed without comment or analysis.

Perhaps the clearest example of this conduct can be seen in the Court's treatment of defense counsel Kempton's failure to explore a plea bargain. In that regard, the Court of Appeals held as follows:

> "Finally, because Kempton was the target of the same criminal investigation, he may not have pursued a plea bargain in which Mannhalt would agree to testify against Kempton. Exploring possible plea negotiations is an important part of providing adequate representation of a criminal client, and this part is easily precluded by a conflict of interest."

Mannhalt v. Reed, 9th Cir. No. 87-4093.

This statement ignores the fact that Mannhalt, the Defendant at trial, executed an Affidavit in the United States District Court for the Western District of Washington in which he makes it clear that he could not have corroborated Morris' accusations and that Kempton was not guilty of any wrongdoing. CR 34. Mannhalt supports Kempton in dismissing Morris' allegation as a complete fabrication.

There was, therefore, never anything concerning Kempton for Mannhalt to bargain away to the prosecutors. Any deal to testify against Kempton would have been an agreement to lie on the stand and to assist in the conviction of an innocent man.

Yet, the decision of the Court of Appeals holds that the denial to Mannhalt of this opportunity to perjure himself was a violation of the Sixth Amendment to the United States Constitution and necessitates a new trial.

The Ninth Circuit's incredible disregard of the undis-

puted factual record continued in regard to each of the hypothetical adverse impacts.

The Court of Appeals held that Kempton should have disqualified himself so as to be available to testify and dispute Morris' testimony about the stolen ring. In so doing, the Court of Appeals simply ignored the fact that the Supreme Court of Washington had already, in the case at bar, declared that Kempton could not have testified, in that his testimony would have been inadmissible as independent evidence to impeach on a collateral matter. *See*, Appendix C.

The Court of Appeals held that Morris' accusation against Kempton adversely affected Kempton's cross-examination of Morris. The court never even acknowledged that the decision to cross-examine Morris on this issue was made only after extensive consultation with Mannhalt and with his approval. Nor did the court acknowledge that the decision was a tactically reasonable one. It was, apparently, not significant either that the jury considered the cross-examination devastating and disregarded Morris' testimony entirely. (Evans Deposition, pp. 67-68).

Finally, the Court of Appeals determined that Kempton should have questioned Mannhalt about Morris' allegation. This was deemed to be an adverse impact despite the fact that Morris' allegation was treated as a deliberate lie by the jury. (Evans Deposition, pp. 67-68). No credence was accorded to Kempton's professionally reasonable explanation for the omission.

Disregarding the factual record in the case at bar, the Court of Appeals rested on theoretical impacts as sufficient to overturn Mannhalt's conviction. Without requiring the defendant to identify even one concrete example of an actual adverse effect on his defense, the Court of Appeals directed that each and every conviction in the subject case be vacated.

3. The effect of the decision of the Court of Appeals in the case at bar will be to encourage the proliferation of ineffectiveness challenges.

The decision of the Court of Appeals to dispense with the necessity for the defendant to demonstrate an actual conflict and true adverse impact, greatly lowers the threshold for asserting a successful claim of ineffective assistance. In effect, it hands to every inmate convicted in a contested trial the means to overturn his or her conviction.

The Court of Appeals for the Ninth Circuit has said that an attorney accused of involvement in crime with his client is presumed to suffer from a conflict of interest. There is no requirement that the accusation be corroborated. In fact, as in the case at bar, convincing evidence that the accusations are false is, apparently, of no significance. The accusation alone is enough.

There is nothing either to stop the criminal defendant himself, after his conviction, from making these accusations. Certainly, it would be possible for an inmate to accuse his attorney of criminal conduct somehow related to the charges at trial without necessarily implicating himself in any wrongdoing. Such an accusation, coupled with the presumption created by the Ninth Circuit, would be sufficient to establish a conflict of interest.

Once a conflict is established, the only remaining hurdle is the demonstration of an adverse impact. Given that the Court of Appeals is satisfied with the mere potential for adversity and is willing to conduct a very intrusive inquiry, this hurdle is of little, if any, significance.

In particular, the potential impact of such a conflict on plea negotiations appears to be a fertile area for an accused attacking his conviction. In virtually every contested case there will be an issue as to whether a plea bargain to the benefit of the accused could have been reached. Following the reasoning of the Court of Appeals in the case at bar, the possibility that such a deal might have been struck, coupled with a conflict of interest based on an accusation of criminal involvement by the defense counsel, will be sufficient to support a claim of ineffective assistance of counsel. This in turn will necessitate the vacation of the judgment of the trial court and the release of a convicted felon from confinement.

There is literally nothing to prevent such a result. Every convicted felon now has only to accuse his defense counsel of crimes related to those for which he was tried in order to force his release or retrial. The potential for an endless cycle of trial and retrial is obvious.

The United States Supreme Court has not been blind to the dangers inherent in ineffective assistance of counsel claims. It is precisely because of those dangers that the Supreme Court has required the demonstration of an actual conflict and a true adverse impact and has not judged potential conflicts and hypothetical impacts sufficient.

> "The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense."

Strickland, 466 U.S. at 690.

CONCLUSION

For all of the aforegoing reasons, the Writ of Certiorari should be granted.

DATED this _____ day of August, 1988.

Respectfully submitted,

KENNETH O. EIKENBERRY
Attorney General

CHARLES S. FADDIS
Assistant Attorney General
Department of Corrections
Mail Stop: FZ-11
Olympia, WA 98504
(206) 586-1445

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-4093

D.C. No.
CV-86-311-BJR

OPINION

GUENTER MANNHALT,

Petitioner-Appellant,

v.

AMOS E. REED,

Respondent-Appellee.

Appeal from the United States District Court
For the Western District of Washington
BARBARA J. ROTHSTEIN, District Judge, Presiding

Argued and Submitted
April 6, 1988—Seattle, Washington

Filed May 25, 1988

Before: ROBERT R. BEEZER, CYNTHIA HOLCOMB HALL and CHARLES WIGGINS, Circuit Judges.

Opinion by Judge WIGGINS

SUMMARY

Criminal Procedure/Attorneys

Appeal from denial of petition for a writ of habeas corpus. Reversed and remanded. The court held that appellant was denied effective assistance of counsel because of his attorney's conflict of interest.

Appellant Mannhalt was charged with robbery and possession of stolen property. He was represented by Kempton, who had previously represented him in a related trial.

The charges against Mannhalt followed the arrest of Morris. Morris agreed to testify against several individuals, including Mannhalt, as part of a plea bargain. Kempton appeared with Morris at his arraignment. According to a police report, Morris agreed to give information about a stolen ring purchased by Kempton. Kempton discussed the accusation with Mannhalt, but did not point out a potential conflict of interest. At trial, Kempton conducted an extensive cross-examination of Morris. Kempton confronted Morris with his accusation that Kempton had purchased stolen property. Kempton lost his composure during the cross-examination. Kempton did not question Mannhalt about whether Kempton purchased stolen jewelry. Mannhalt was convicted. After exhausting his state remedies, both parties moved for summary judgment concerning Mannhalt's habeas corpus petition. The district court rejected a magistrate's report and recommendation finding that Mannhalt's ineffective assistance claim had merit. The state received summary judgment.

[1] Conflicts of interest can arise both in cases of simultaneous and successive representation. **[2]** This is a case of successive representation. In successive representation, conflicts of interests may arise if the cases are substantially related or if the attorney reveals privileged communications of the former client or otherwise divides his loyalties. Here, the prior representation was completely unrelated and Mannhalt has not shown that any privileged information was either divulged *or* withheld. **[3]** Although Mannhalt was aware before trial of Morris' accusation against Kempton, he has not waived his right to conflict-free representation. Here, Kempton discussed the accusation with Mannhalt but never told him that it created a potential conflict of interest. Accordingly, this court does not find a waiver. **[4]** Under the first prong of *Cuyler*, when an attorney is accused of crimes similar or related to those of his client, an actual conflict exists because the potential for diminished effectiveness in representation is so great. **[5]** Under the second prong, Morris' accusation against Kempton adversely affected Mannhalt's represen-

tation. [6] First, Kempton should have disqualified himself so as to be available to testify and dispute Morris' testimony about the stolen ring. [7] Second, Morris' accusation against Kempton adversely affected Kempton's cross-examination of Morris. [8] Finally, because Kempton was the target of the same criminal investigation, he may not have pursued a plea bargain in which Mannhalt would agree to testify against Kempton.

COUNSEL

Richard Hansen, Allen & Hansen, Seattle, Washington for the petitioner-appellant.

Charles S. Faddis, Assistant Attorney General, Department of Corrections, Olympia, Washington, for the respondent-appellee.

OPINION

WIGGINS, Circuit Judge:

Guenter Mannhalt, a Washington state prisoner, appeals the district court's denial of his petition for a writ of habeas corpus, filed under 28 U.S.C. § 2254. Mannhalt alleges that he was denied effective assistance of counsel because of his attorney's conflict of interest and that a jury instruction deprived him of due process. We REVERSE.

I.

FACTS AND PROCEEDINGS BELOW

In December, 1980, Guenter Mannhalt was charged in King County, Washington, with one count of conspiracy to commit robbery, one count of attempted robbery, and several counts of robbery and possession of stolen property. In all the robbery counts, the state alleged that Mannhalt was an accomplice by virtue of soliciting others to commit the crimes. The possession of stolen property counts were based on jewelry seized from a safe in Mannhalt's donut shop.

Mannhalt was represented at trial by James Kempton, a Seattle attorney. Kempton had known Mannhalt for several years and had previously represented him in a related trial in Whatcom County, Washington. Sometime in 1979 or 1980 Kempton purchased a gold watch from Mannhalt. Mannhalt assured Kempton that the watch had been purchased from a friend.

The charges against Mannhalt followed the arrest in October, 1980, of Tommy Morris in connection with several robberies. Morris agreed to testify against several individuals, including Mannhalt, as part of a plea bargain. Before this deal was negotiated, Kempton appeared with Morris at his arraignment. Kempton's associate, Deborah Youngblood, later represented Morris at a line-up. Both attorneys claim that they never discussed any aspect of the case with Morris. Kempton never formally agreed to represent Morris and never opened a file.

According to a police report dated November 9, 1980, Morris agreed to give information about twelve items. Item No. 11 read:

> 11. Attorney James Kempton purchased a stolen ring $1200 with $100 bills; taken from Lake Washington area. Also purchased a stolen bracelet.

Kempton became aware of this accusation while preparing for Mannhalt's trial. Kempton discussed the accusation with Mannhalt, but did not point out a potential conflict of interest.

At trial, Kempton conducted an extensive cross-examination of Morris, who testified on behalf of the prosecution. Kempton brought out that Morris had received a favorable plea bargain for agreeing to testify. Kempton then confronted Morris with his accusation that Kempton had purchased stolen property. Kempton became increasingly agitated during the cross-examination. Kempton offered his own unsworn testimony that Morris' accusation was false: "No, he's telling the police I'm buying stolen goods. I'm proving he's a liar." At one point Kempton asked his wife, a spectator, about her jewelry and she came forward and commented that she was wearing rings and

that she hoped they were not glass. Kempton asked Morris many times whether he would lie and Morris replied: "Would you?" and "I've got up here and told the truth to the best of my knowledge." Kempton also asked Morris about the "diamonds from the market place" in evidence against Mannhalt. Morris admitted he had been in the donut shop where the jewelry had been seized and where Kempton had allegedly purchased stolen jewelry. Morris then volunteered that he had seen Kempton at the donut shop.

Kempton admitted that he lost his composure during the cross-examination. In his affidavit submitted in these habeas corpus proceedings, Kempton stated: "I was visibly shaken and I was furious. The court cannot appreciate the furor one feels when being confronted by an absolute thieving liar and saying that one is the purchaser of stolen items." Also, during the cross-examination the trial judge remarked: "Things are coming a little unglued here, a little bit out of order."

Kempton did not take the stand to refute Morris' accusation. Neither did Kempton question Mannhalt about whether Kempton had ever purchased stolen jewelry.

Mannhalt was convicted on the conspiracy charge, seven robbery charges, and three possession of stolen property charges. (Counts I-VII, XIII-XV). He was acquitted on four robbery charges and one stolen property charge (Counts IX-XIII, XVI). On September 18, 1981, Mannhalt was sentenced to concurrent life terms on six first degree robbery counts and lesser concurrent terms on the remaining counts.

Mannhalt has exhausted his state remedies as required by 28 U.S.C. § 2254. In denying Mannhalt's petition for discretionary review, the Washington Supreme Court found no actual conflict of interest presents. Mannhalt then filed a habeas corpus petition in federal court. The parties submitted depositions of the state court prosecutors, and affidavits of the defense attorneys and Mannhalt. Both parties moved for summary judgment. On February 10, 1987, the United States Magistrate issued a report and

recommendation finding that Mannhalt's ineffective assistance claim had merit. The district court judge rejected the recommendation and granted the state's summary judgment motion. The Magistrate submitted a supplemental report and recommendation on the unconstitutional jury instruction issue, finding the claim meritless. The district court adopted the recommendation and entered judgment on July 20, 1987.

Mannhalt raises two claims on appeal. First, he argues that he was denied effective assistance of counsel because his attorney had previously represented a key government witness and because his attorney was accused of criminal conduct related to that for which Mannhalt was being tried. Second, Mannhalt urges that the trial court's jury instruction on accomplice liability violated due process by relieving the state of its burden of proving every element of a crime beyond a reasonable doubt.

II.

STANDARD OF REVIEW

This court reviews de novo the decision to grant or deny a petition for habeas corpus. *Weygandt v. Ducharme*, 774 F.2d 1491, 1492 (9th Cir. 1985). The question of whether an attorney renders ineffective assistance is a mixed question of law and fact, reviewed de novo. *Butcher v. Marquez*, 758 F.2d 373, 376 (9th Cir. 1985).

III.

ANALYSIS

To prevail on his claim for habeas relief, Mannhalt must show that his detention violates the Constitution, a federal statute, or a treaty. *See Rose v. Hodges*, 423 U.S. 19, 21 (1975) (per curiam); 28 U.S. C. § 2241(c)(3). Mannhalt alleges that he was deprived of his sixth amendment right to effective assistance of counsel because his attorney had two conflicts of interest. First, Kempton had previously represented a key government witness, and second, Kemp-

ton had been accused of criminal conduct related to that for which Mannhalt was being tried.

The sixth amendment guarantee of effective assistance of counsel comprises two correlative rights: the right to counsel of reasonable competence, *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970), and the right to counsel's undivided loyalty, *Wood v. Georgia*, 450 U.S. 261, 272 (1981). The Supreme Court has articulated the different standards by which to judge the violation of these rights. To establish a sixth amendment violation based on a conflict of interest the defendant must show 1) that counsel actively represented conflicting interests, and 2) that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348, 350 (1980). Unlike a challenge to counsel's competency, prejudice is presumed if the defendant makes such a showing. *Strickland v. Washington*, 466 U.S. 668, 692 (1984). Although *Cuyler* involved a conflict of interest between clients, the presumption of prejudice extends to a conflict between a client and his lawyer's personal interest. *See United States v. Hoffman*, 733 F.2d 596, 601-02 (9th Cir.) (client alleged conflict because of attorney's failure to notify federal judge of state bar suspension), *cert. denied*, 469 U.S. 1039 (1984); *United States v. Hearst*, 638 F.2d 1190, 1193 (9th Cir. 1980) (conflict based on attorney's private financial interests), *cert. denied*, 451 U.S. 938 (1981).

A. *Prior Representation of Government Witness*

Mannhalt argues that a conflict existed between Kempton and himself because Kempton had represented Morris in a prior unrelated criminal case and briefly at Morris' arraignment and line-up in this case. An exchange at trial revealed this prior representation and, according to Mannhalt, suggested that Morris would have gone to trial even though guilty if he could have afforded to hire Kempton. Mannhalt argues, therefore, that he was impliedly guilty by association with his defense counsel.

[1] Conflicts of interest can arise both in cases of simul-

taneous and successive representation. Generally, it is more difficult to show an actual conflict resulting from successive rather than simultaneous representation. *Smith v. White*, 815 F.2d 1401, 1405 (11th Cir.), *cert. denied*, 108 S. Ct. 181 (1987). Although Kempton and Youngblood appeared at Morris' arraignment and line-up, this is not a case of simultaneous representation. Neither attorney entered into an attorney-client relationship with Morris. They did not discuss the case with Morris or open a file and no further action was taken on Morris' behalf after the line-up.

[2] At most, then, this is a case of successive representation. Kempton does not recall ever representing Morris, but even assuming he did, Mannhalt has failed to show how this prior representation created an actual conflict with Kempton's representation of Mannhalt in this case. In successive representation, conflicts of interests may arise if the cases are substantially related or if the attorney reveals privileged communications of the former client or otherwise divides his loyalties. *United States v. Wheat*, 813 F.2d 1399, 1402 & n. 1 (9th Cir.), *cert. granted on other grounds*, 108 S. Ct. 66 (1987); *Trone v. Smith*, 621 F.2d 994, 998-99 (9th Cir. 1980). Here, the prior representation was completely unrelated and Mannhalt has not shown that any privileged information was either divulged *or* withheld. Thus, no actual conflict existed.

Instead, Mannhalt claims that Kempton's prior representation of Morris somehow implied Mannhalt's guilt. This contention is entirely speculative. Although the admittedly guilty Morris may have gone to trial if he could have paid Kempton, this implies *nothing* about Mannhalt's guilt or innocence.

B. *Morris' accusation of criminal conduct by Kempton*

Mannhalt also alleges a conflict of interest between himself and Kempton because Morris had accused Kempton of buying stolen property from Mannhalt.

[3] Mannhalt cannot prevail on this claim if he has waived it by consenting to Kempton's representation. Al-

though Mannhalt was aware before trial of Morris' accusation against Kempton, he has not waived his right to conflict-free representation. The waiver of the right to counsel must be knowing and intelligent. Whether there is a proper waiver should be determined by the trial court and any such waiver should appear on the record. *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938). Here, Kempton discussed the accusation with Mannhalt but never told him that it created a potential conflict of interest and never warned Mannhalt of the dangers of continued representation. The trial court was unaware of the conflict and thus never discussed it with Mannhalt. *Cf. United States v. Powell*, 708 F.2d 455, 456-57 (9th Cir. 1983) (finding waiver where conflict discussed in detail in open court), *rev'd on other grounds*, 469 U.S. 57, 69 (1984); *United States v. Partin*, 601 F.2d 1000, 1007-08 (9th Cir. 1979) (same), *cert. denied*, 446 U.S. 964 (1980). We do not condone the practice of a defendant remaining silent when he in fact knows of a conflict of interest. But on the record before us, we cannot find that Mannhalt was informed and aware of the risks associated with Kempton's representation. We, therefore, do not find a waiver by Mannhalt of the possible conflict between himself and Kempton.

[4] We turn now to the application of the *Cuyler* standard to the facts of this case. We must first determine whether an actual conflict existed. We find that when an attorney is accused of crimes similar or related to those of his client, an actual conflict exists because the potential for diminished effectiveness in representation is so great. For example, a vigorous defense might uncover evidence of the attorney's own crimes, and the attorney could not give unbiased advice to his client about whether to testify or whether to accept a guilty plea. *See United States v. Cancilla*, 725 F.2d 867, 870 (2d Cir. 1984) (counsel may have conspired with someone connected to defendant or similar fraudulent insurance claims and thus actual conflict existed); *see also United States v. Salinas*, 618 F.2d 1092, 1093 (5th Cir.) (trial judge was within discretion in disqualifying attorney over defendant's objection where at-

torney was target of investigation concerning events for which clients were indicted), *cert. denied*, 449 U.S. 961 (1980).

[5] The second prong of *Cuyler* is whether the conflict adversely affected counsel's performance. Here, Morris' accusation against Kempton adversely affected Mannhalt's representation in four areas: 1) Kempton's failure to testify to rebut Morris' allegations, 2) Kempton's cross-examination of Morris, 3) Kempton's failure to question Mannhalt on direct about the allegations, and 4) Kempton's failure to explore possible plea bargains.

[6] First, Kempton should have disqualified himself so as to be available to testify and dispute Morris' testimony about the stolen ring. The Washington State Rules of Professional Conduct (RPC) require that "[a] lawyer shall not act as advocate at a trial in which the lawyer * * * is likely to be a necessary witness. * * *" Washington Court Rules RPC 3.7. Moreover, the Model Code of Professional Responsibility in effect in Washington at the time of Mannhalt's trial required that defense counsel withdraw when "a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of a client * * * ." Model Code of Professional Responsibility DR 5-102(A). The policy rationale behind this prohibition is to avoid placing the advocate in the unseemly position of arguing his own credibility to the jury. *Id.* at EC 5-9. In a recent Second Circuit case, the court found a conflict where defense counsel could have been called as a government witness to rebut and/or clarify the testimony or another government witness. *United States v. Iorizzo*, 786 F.2d 52, 57 (2d Cir. 1986). Also, courts have disqualified counsel pretrial over the defendant's objections if it appears counsel will or should be called as a witness. *See e.g., United States v. Kwang Fu Peng*, 766 F.2d 82, 86 (2d Cir. 1985); *United States v. DeLuna*, 584 F. Supp. 139, 146 (W.D. Mo. 1984).

Here, the district court found that Kempton had no need to disqualify himself because his testimony would have been inadmissible as independent evidence to im-

peach on a collateral matter. In Washington, a trial court may permit a cross-examiner to inquire into collateral matters to test the witness' credibility, but the cross-examiner may not introduce evidence to show the answers are false. *State v. Lahti*, 23 Wash. App. 648, 649-50, 597 P.2d, 937, 938, *review denied*, 92 Wash. 2d 1036 (1979). The test of collateralness is: "Could the fact to which error is predicated have been shown for any purpose independently of the contradiction?" *Id.* at 650, 597 P.2d at 938. Kempton's testimony may have been independently admissible to show Morris' motive—i.e. Morris was so desperate to get a plea bargain that he would even fabricate criminal conduct by Kempton. Moreover, Morris' accusations against Mannhalt and Kempton were factually intertwined. His accusations against both attorney and client were part of the same conversation with police officers and were documented in the same police report. In addition, Mannhalt was tried for possessing stolen property seized from his donut shop. Morris accused Kempton of buying stolen property at this same donut shop and Kempton admits that he bought a gold watch there.

Even if Kempton's testimony would have been inadmissible, his cross-examination of Morris put his own and his wife's unsworn testimony before the jury. Kempton told the jury that he did not buy a stolen ring. Although the jury was instructed not to consider these comments as evidence, Kempton put himself in the position of arguing his own credibility, precisely what DR 5-102(A) seeks to avoid. *Accord Iorizzo*, 786 F.2d at 57 (whether or not attorney testified, his firsthand involvement would cause any argument to jury about testimony to be viewed as a statement of a witness as well as of an advocate).

[7] Second, Morris' accusation against Kempton adversely affected Kempton's cross-examination of Morris. Kempton's personal interest in preserving his reputation and avoiding criminal prosecution may have impacted the manner of the cross-examination.[1]

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[1] Mannhalt also argues that Kempton's personal interests affected his decision whether to ask Morris about the accusation. Kempton

Once Kempton decided to question Morris, both he and Mannhalt had an interest in undermining Morris' credibility. The manner of the cross-examination indicated, however, that Kempton was motivated, at least in part, by personal concerns. The examination was by all accounts unorthodox. Kempton admitted that he was shaken and furious. Kempton's emotional performance may have effectively discredited Morris in the eyes of the jury. It is equally likely, however, that the jury viewed Kempton's anger as implying that Kempton and possibly his client were involved in illegal conduct. Kempton's personal feelings about Morris' allegation may have thus adversely affected his performance.

Third, having brought out Morris' accusation on cross, Kempton could have asked Mannhalt about it on direct examination. Mannhalt suggests Kempton did not do so because he feared the prosecution would elicit on cross that Kempton had purchased a watch from Mannhalt. Kempton claims that Morris had been so thoroughly discredited that no further refutation was necessary.

After reviewing the cross-examination, we are not convinced that refutation by Mannhalt was unnecessary. As noted above, the jury could have inferred from Kempton's emotional cross-examination that Morris' accusation was true. This impression may have been bolstered by the fact that neither Kempton nor Mannhalt denied the allegation in sworn testimony. Kempton's decision not to question Mannhalt thus may have been affected by Kempton's personal concerns.

[8] Finally, because Kempton was the target of the same criminal investigation, he may not have pursued a plea bargain in which Mannhalt would agree to testify against Kempton. Exploring possible plea negotiations is an important part of providing adequate representation of a

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claims he questioned Morris on cross because he feared the accusation would come out on redirect and because he thought it was good impeachment material. This explanation seems plausible. Kempton's personal interest would have probably been to avoid mentioning the allegation at all.

criminal client, and this part is easily precluded by a conflict of interest. *See Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978)

According to the deposition of state prosecutor Evans, the state was very interested in Morris' information about Kempton and considered pursuing it.

> A: [by Evans] First, when I was made aware of this, I went, "bingo" And I will not go into this in great length but, clearly, I had been told for many years pervious that your client was an important fence. You could sit outside and see the stuff go in. One of the big questions everybody has already had was where did it go? You know, very simple.
>
> Well, if you could show that he had clientele of upper-class, professional people in town, that would explain a lot of things. So, as a prosecutor, I was terribly interested in this piece of information. And I cannot speak for the police, I have no idea, but I know I leaned on them hard to do everything they could to chase that down, to put it to rest, one way or the other.
>
> Secondly, because by the time that I was really aware of this—and this has to be mid-November, late November—it is clear that Kempton is now going to represent Guenter, both in Whatcom County and potentially here, in any case, that is developed against him. Well, you know, that raises some issues that we are here to talk about.
>
> To me, it was apparent that I had to do something with that information, cleanly. Either wind up charging the man or exonerating him, if I could, whichever, chasing it down. I essentially put it to the police in those terms. * * *
>
> Q: Mr. Evans, relative to Mr. Morris' accusation against Mr. Kempton, did you ever see that as a conflict of interest for Mr. Kempton?
>
> A: Initially, I did. Clearly, if there was any merit to it, he could not—number one, he was going to get prosecuted if I could corroborate, maybe even turn the tables and offer Guenter a deal. Look, and this is straight, I would have done so. Maybe not against all the charges, but we would have made some accommodation.

The district court found that this potential conflict never became an actual conflict because the prosecution never offered Mannhalt any such deal and because Mannhalt did not have any information to corroborate Morris' story. The fact that no offer was made is irrelevant—the prosecutors could not possibly have approached Mannhalt with a deal to give information about Kempton once Mannhalt retained Kempton as his attorney. And although Mannhalt could not corroborate Morris' story about the stolen ring, he could have told prosecutors about the watch Kempton purchased and conceivably been granted some leniency.

Although it is impossible to speculate what the prosecution would have done if Mannhalt had not retained Kempton, it is clear that Kempton did not pursue a plea bargain that might have involved revealing incriminating information about himself. Therefore, a conflict adversely affected Kempton's performance.

In sum, Kempton faced two potential conflicts in his representation of Mannhalt. First, he had twice previously represented Morris, a key government witness. This was not an actual conflict, however, because the first case was unrelated, and Kempton's appearance at the arraignment and line-up in this case did not involve any privileged communication. Second, Morris had accused Kempton of criminal conduct related to the robbery and stolen property charges for which Mannhalt was being tried. This created an actual conflict and likely affected Kempton's performance in four ways: he could not call himself as a witness to refute Morris' accusations but his cross-examination included much of his own unsworn testimony, he cross-examined Morris in an unseemly and emotional manner, he did not question Mannhalt about Morris' accusation on direct, and he could not pursue a plea bargain that might implicate himself. Mannhalt has thus met the requirements of *Cuyler* and shown a violation of his sixth amendment right to effective assistance of counsel.

We add a final note. The prosecution here was fully aware before Mannhalt's trial began of Morris' accusation

against Kempton. The prosecution, therefore, had ample opportunity to bring the potential conflict to the trial judge's attention and move for disqualification if appropriate. Such a process would have also enabled Mannhalt if he so desired to waive any conflict on the record after adequate warning. We trust that this opinion will ensure a pretrial disposition of such conflict of interest issues in the future.

IV.

CONCLUSION

We REVERSE the district court's grant of summary judgment in favor of respondent Reed, GRANT petitioner Mannhalt's motion for summary judgment and REMAND to the district court for the grant of a conditional writ. The state is permitted 90 days from this remand to refile.[2]

REVERSED AND REMANDED.

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[2] Because we grant Mannhalt's petition for writ of habeas corpus on sixth amendment grounds, we do not reach his argument that the jury instructions on accomplice liability violated due process.

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

No. 80-1-05103-9

JUDGMENT AND SENTENCE

STATE OF WASHINGTON, *Plaintiff,*

v.

GUENTER MANNHALT, *Defendant.*

The Prosecuting Attorney with the above-named defendant and his counsel James Kempton and Deborah Youngblood came into Court. The defendant was duly informed by the Court of the nature of the Amended Information found against him for the crimes: Count I — CONSPIRACY TO COMMIT ROBBERY IN THE FIRST DEGREE (RCW 9A.28.040(1) and RCW 9A.56.190/.200); Counts II-VIII — ROBBERY IN THE FIRST DEGREE (RCW 9A.56.200(1)(b)/.190 and RCW 9A.04.110(6) and RCW 9A.08.020(1)(2)(c) and (3)); Count IX — ATTEMPTED ROBBERY IN THE FIRST DEGREE (RCW 9A.28.020 and RCW 9A.56.200(1)(b)/.190 and RCW 9A.04.110(6) and RCW 9A.08.020(1)(2)(c) and (3)); Counts X-XII — ROBBERY IN THE FIRST DEGREE; Count XIII — POSSESSION STOLEN PROPERTY IN THE FIRST DEGREE (RCW 9A.56.010(12)(d)/.140-160); Counts XIV-XVI — POSSESSION STOLEN PROPERTY IN THE SECOND DEGREE (RCW 9A.56.140/.160(1)(e)), of his arraignment and plea of "Not guilty of the offenses charged in the amended information," of his trial and the verdict of the jury on the 10th day of June, 1981, "guilty as charged" in counts I, IV, V, VI, VIII, IX, X, XI, XIII, XIV, and XV, and "not guilty" in counts II, III, VII, XII, and XVI.

The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied he had none.

And no sufficient cause being shown or appearing to the Court, the Court renders its judgment: That whereas the said defendant has been duly convicted by a jury in this Court, it is therefore,

ORDERED, ADJUDGED and DECREED

1. That the said defendant is guilty of the crimes of Count I — CONSPIRACY TO COMMIT ROBBERY IN THE FIRST DEGREE (RCW 9A.28.040(1) and RCW 9A.56.190/.200); Counts IV, V, VI, VIII, X and XI —ROBBERY IN THE FIRST DEGREE (RCW 9A.56.200(1)(b)/.190 and RCW 9A.04.110(6) and RCW 9A.08.020(1)(2)(c) and (3)); Count IX — ATTEMPTED ROBBERY IN THE FIRST DEGREE (RCW 9A.28.020 and RCW 9A.56.200(1)(b)/.190 and RCW 9A.04.110(6) and RCW 9A.08.020(1)(2)(c) and (3)); Count XIII — POSSESSING STOLEN PROPERTY IN THE FIRST DEGREE (RCW 9A.56.010(12)(d)/.140-.160); Counts XIV and XV — POSSESSING STOLEN PROPERTY IN THE SECOND DEGREE (RCW 9A.56.140/.160(1)(e));

2. That the said defendant be sentenced to imprisonment in such penal institution or correction facility, under the jurisdiction and supervision of the Department of Corrections pursuant to the provisions of RCW 72.13.120, for a maximum term of not more than *LIFE on each of Counts IV, V, VI, VIII, X and XI*, and not more than *TEN (10) years on each of Counts I and IX*, said sentences to run concurrently with each other, and a minimum term to be fixed by the Board of Prison Terms and Paroles; and

(3) That the said defendant be sentenced to imprisonment in such penal institution or correction facility, under the jurisdiction and supervision of the Department of Corrections pursuant to the provisions of RCW 72.13.120, for a maximum term of not more than *TEN (10) years on Count XIII* and not more than *FIVE (5) years on each of Counts XIV and XV*, said sentences to run concurrently with each other and a minimum term to be fixed by the Board of Prison Terms and Paroles; and

(4) That in lieu of the fine authorized for this offense

under RCW 9A.20.020(a), (b) and (c), the said defendant shall pay an amount to be agreed upon or determined after a restitution hearing, pursuant to the provisions of RCW 9A.20.030 and subject to the terms and conditions set forth in the Court's separate order entitled "Order of Monetary Payment in Lieu of Fine;"

(5) That the said defendant is hereby remanded to the custody of the King County Department of Rehabilitative Services to be by them detained until called for by the transportation officers of the Department of Corrections, authorized to conduct him to the Washington Corrections Center.

DONE IN OPEN COURT this 17th day of September, 1981.

/s/ Stephen M. Reilly
Judge

Presented by:

/s/ H. DUANE EVANS
Senior Deputy
Prosecuting Attorney

/s/ WILLIAM H. REDKEY, JR.
Deputy Prosecuting Attorney

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

No. 80-1-04198-0

JUDGMENT AND SENTENCE

STATE OF WASHINGTON, *Plaintiff,*

v.

GUENTER MANNHALT, *Defendant.*

The Prosecuting Attorney with the above-named defendant and counsel James Kempton/Deborah

Youngblood came into court. The defendant was duly informed by the Court of the nature of the information found against him for the crime(s) of POSSESSING STOLEN PROPERTY IN THE SECOND DEGREE, (RCW 9A.56.160(1)(e) and RCW 9A.56.140(1)) of his arraignment and plea of "Not guilty of the offense charged in the information," of his trial and verdict of the jury on the 10th day of June, 1981, "guilty as charged".

The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied he had none.

And no sufficient cause being shown or appearing to the Court, the Court renders its judgment: That whereas the said defendant has been duly convicted by a jury in this Court, it is therefore, ORDERED, ADJUDGED and DECREED that the said defendant is guilty of the crime(s) of POSSESSING STOLEN PROPERTY IN THE SECOND DEGREE, a Class "C" Felony, RCW 9A.56.160(1)(e) and RCW 9A.56.140(1), and that he be sentenced to imprisonment in such penal institution or correction facility, under the jurisdiction and supervision of the Department of Corrections pursuant to the provisions of RCW 72.13.120, for a maximum term of not more than FIVE (5) years, to run concurrent with sentences imposed in King County Cause No. 80-1-05103-9, and a minimum term to be fixed by the Board of Prison Terms and Paroles.

The defendant is hereby remanded to the custody of the King County Department of Rehabilitative Services to be by them detained until called for by the transportation officers of the Department of Corrections, authorized to conduct him to the Washington Corrections Center.

DONE IN OPEN COURT this 17th day of September, 1981.

/s/ STEPHEN M. REILLY
Judge

Presented by:

/s/ WILLIAM H. REDKEY, JR.
Deputy Prosecuting Attorney

APPENDIX C

THE SUPREME COURT OF WASHINGTON

No. 51253-1

RULING DENYING MOTION FOR DISCRETIONARY REVIEW

IN THE MATTER OF THE PERSONAL RESTRAINT PETITION OF

GUENTER MANNHALT, *Petitioner.*

Guenter Mannhalt moves for discretionary review of a Court of Appeals' denying a personal restraint petition in which he challenged a collection of convictions (for conspiracy to commit robbery, first degree robbery, attempted robbery, and possession of stolen property). Mr. Mannhalt raises three grounds for relief: (1) the trial court erred in failing to instruct the jury that the State had the burden of proving that he, as an accomplice, knew his principals were armed during the commission of the robberies; (2) his conviction for conspiracy merged with his convictions for those robberies; and (3), he was denied the effective assistance of counsel.[1]

In order to grant review, I must be persuaded that the Court of Appeals, in finding each of these claims to be without merit, *committed an obvious, or probable error or substantially departed from the accepted and usual course of judicial proceedings. RAP 13.5.* After reviewing Mr. Mannhalt's claims, I conclude that his motion meets none of these criteria.

Neither the first nor the second ground for relief mentioned above merits much discussion. As to the first, this court has recently rejected the argument that, in order to establish accomplice liability, the State must prove that the accomplice knew his principal was armed during the

[1]Mr. Mannhalt raised all three of these issues in his petition for review of the Court of Appeals' opinion affirming his conviction on appeal. This court denied review of Mr. Mannhalt's petition. *State v. Mannhalt*, No. 49831-8, 100 Wn.2d 1024 (1983).

commission of a robbery. *State v. Davis*, 101 Wn.2d 654, 682 P.2d 883 (1984). Nothing in *Davis*, supports Mr. Mannhalt's suggestion that there should be an exception for an accomplice who solicits others to participate in a robbery but is not physically near when the robbery takes place.

Concerning Mr. Mannhalt's merger claim, this court has recognized the rule of construction generally known as Wharton's Rule: When the substantive offense necessarily requires the participation of two persons, and where no more than two persons are alleged to have been involved in the agreement to commit the offense, the charge of conspiracy will not lie. *State v. Langworthy*, 92 Wn.2d 148, 151-52, 594 P.2d 908 (1979). Neither Washington caselaw nor the applicable statute, RCW 9A.28.040, recognizes any other merger rule. *See State v. Walker*, 24 Wn.2d 78, 81, 599 P.2d 533 (1979). Further, to the extent that Mr. Mannhalt suggests there is some double jeopardy problem here, he has made no attempt to counter the Court of Appeals' reliance on the concurrent sentence rule of *State v. Johnson*, 96 Wn.2d 926, 639 P.2d 1332 (1982).

This leaves Mr. Mannhalt's claim that his trial counsel was ineffective. Mr. Mannhalt does not appear to challenge his former counsel's general competence as a lawyer. Rather, he points *to an incident when*, on cross examination, his trial counsel questioned a prosecution witness concerning the witness's allegation that counsel had purchased stolen goods from Mr. Mannhalt. He sees in this incident a violation of the Sixth Amendment right to counsel's undivided loyalty. *See Wood v. Georgia*, 450 U.S. 261, 271, 67 L. Ed. 2d 220, 101 S. Ct. 1097 (1981).

The Supreme Court has held that when a defendant merely challenges the competency of counsel, he is required to demonstrate that counsel's performance was deficient and that this deficient performance actually prejudiced the defense. *Strickland v. Washington*, ____ U.S. ____, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Prejudice is presumed, however, when a defendant can show that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335,

348, 64 L. Ed. 2d 333, 100 St. Ct. 1708 (1980); *see also In re Richardson*, 100 Wn.2d 669, 675 P.2d 209 (1983) (holding that this court will likewise presume prejudice in such a situation.) Moreover, "Sullivan mandates a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.' " *Wood v. Georgia*, *supra* at 272 n.18 (quoting *Sullivan*, at 347.) *Accord*, *In re Richardson*, *supra* at 677.

Mr. Mannhalt relies on several recent federal cases to support his allegation that there was a conflict here. *See United States v. Snyder*, 707 F.2d 139 (5th Cir. 1983); *United States v. Hobson*, 672 F.2d 825 (11th Cir.) *cert. denied*, 459 U.S. 906, 74 L. Ed. 2d 166, 103 S. Ct. 208 (1982); *United States v. Salinas*, 618 F.2d 1092 (5th Cir.) *cert. denied*, 449 U.S. 961, 66 L. Ed. 2d 228, 101 S. Ct. 374 (2980); *United States v. Cunningham*, 672 F.2d 1064 (2d Cir. 1982); *Virgin Islands v. Zepp*, 748 F.2d 125 (3d Cir. 1984). These cases hold that there is a conflict either if the attorney is a material witness to the case or if the attorney has been implicated in the criminal conduct for which the defendant is on trial. Each of them, however, is distinguishable from the situation presented here.

As the Court of Appeals correctly noted, *Snyder*, *Hobson*, *Salinas* are distinguishable because counsel's conduct in those cases was directly related to the same offense in which he represented his client. Here, by contrast, the witness never implicated trial counsel in any of the crimes with which Mr. Mannhalt was charged.

In *Cunningham*, counsel was a material witness who needed to testify to explain the charges against his client. That also is unlike this situation. Here, counsel's questioning, even if characterized as an improper attempt to testify was not relevant to the crimes charged, but related only to impeachment of the State's witness on a collateral matter. As the Court of Appeals points out, such impeachment testimony would have been inadmissible even if propoerly offered. *State v. Lahti*, 23 Wn. App. 648, 649, 597 P.2d 937, *rev. denied*, 92 Wn.2d 1036 (1979).

In *Zepp*, counsel was not only implicated in the crime

charged through his presence on the scene, but also entered into a stipulation with the prosecution that tended to exculpate himself and inculpate the defendant. By contrast, in the present case, trial counsel's conduct in no way suggests that he had or may have believed he had any interest that diverged at any point from that of Mr. Mannhalt.

In sum, the Court of Appeals was justified in holding that the facts of this case present no actual conflict which would give rise to a presumption of prejudice.

The Court of Appeals' dismissal of Mr. Mannhalt's petition is neither obvious nor probable error, nor is it a departure from accepted proceedings. The motion for discretionary review is denied.

DATED at Olympia, Washington this 3d day of April, 1985.

/s/ Geoffrey Crooks
Commissioner

APPENDIX D

FOR PUBLICATION

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C86-311R

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S SIXTH AMENDMENT CLAIM AND REFERRING PLAINTIFF'S JURY INSTRUCTION CLAIM TO MAGISTRATE SWEIGERT

GUENTER MANNHALT,

Petitioner,

v.

AMOS E. REED,

Respondent.

THIS MATTER comes before the court on cross-motions for summary judgment regarding a habeas corpus petition. Having reviewed the motions, Magistrate Sweigert's report and recommendation, and all documents filed in support and in opposition, and being fully advised, the court finds and rules as follows:

Petitioner Guenter Mannhalt was convicted in 1981 of one count of conspiracy to commit robbery, six counts of first degree robbery, one count of attempted first degree robbery, one count of first degree possession of stolen property, and two counts of second degree possession of stolen property. Mannhalt claims (1) that he was deprived of the effective assistance of counsel due to a conflict in interest between his counsel and himself, and (2) that he was denied due process of law due to use by the court of an unconstitutional jury instruction.

Magistrate Sweigert, in his report and recommendation, concluded that petitioner's ineffective assistance of counsel claim had merit. Magistrate Sweigert did not reach petitioner's unconstitutional jury instruction claim.

I.

FACTUAL BACKGROUND

Six months prior to Mannhalt's trial, Tommy Morris, a key prosecution witness, was arrested in connection with one of the robberies that led to Mannhalt's trial and conviction. According to the police report, Morris offered to testify against Mannhalt in exchange for lenient treatment. Item 11 on the list of criminal incidents relating to which Morris claimed he could provide information states, "Attorney James Kempton purchased a stolen ring $1200 with $100 bills; taken from Lake Washington area. Also purchased a stolen bracelet." App. to Deborah Youngblood Affidavit.[1]

A copy of the police report containing Morris's accusation was provided to Mannhalt's defense counsel, James Kempton, well in advance of trial. It is not seriously disputed that Kempton became and continued to be, extremely concerned about the effect Morris's allegation might have upon his reputation. *See, e.g.*, Youngblood Affidavit, ¶ 7 (when he learned of the allegation, "Kempton was upset and angry"); Richard Hansen Affidavit at App. A-55 (according to prosecuting attorney Duane Evans, Kempton at one point stated, "you son of a bitch, you're going to ruin my reputation").[2]

Petitioner argues that Kempton's loyalties were divided because the charges against Kempton's client, Mannhalt, became enmeshed with Morris's accusation against Kempton.[3] Petitioner contends that this conflict affected the adequacy of Kempton's representation generally and specifically in the following areas:

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[1]Deborah Youngblood was employed as an associate with Kempton's firm at this time. Youngblood Affidavit, ¶ 1.

[2]Kempton's concern stemmed at least in part from the fact that he had in fact purchased a gold watch from petitioner for $1,000 at petitioner's Donut Shop. Second Kempton Affidavit, pp. 7, 13.

[3]Petitioner also argues that a conflict existed between Kempton and petitioner because Kempton had previously sent Youngblood to represent Morris at the line-up that ultimately led to the filing of robbery charges against Morris and petitioner.

Although Youngblood met with Morris prior to the line-up and

(1) Kempton's failure to negotiate or consider a plea bargain whereby Mannhalt would provide information to prosecutors about Kempton's purchase of jewelry;

(2) Kempton's cross-examination of Morris;

(3) Kempton's failure on direct examination to question Mannhalt about Morris's allegation; and

(4) Kempton's failure to be available to testify in Mannhalt's defense.

II.
LEGAL STANDARD

To establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). If the defendant demonstrates both (1) that counsel "actively represented conflicting interests" and (2) that the conflict of interest adversely affected his lawyer's performance, prejudice is presumed. *Strickland v. Washington*, 466 U.S. 668, 693 (1984).

A potential or hypothetical conflict of interest does not satisfy the *Cuyler* standard. Instead, petitioner must show that counsel "made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other. If he did not make such a choice, the conflict remained hypo-

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represented his interests throughout the line-up, Kempton states that he never accepted Morris's case or discussed that case with him. Kempton Affidavit, p. 4. Neither Kempton nor Youngblood took any further action on Morris' behalf. Youngblood Affidavit, ¶ 4. *But see* Mannhalt affidavit, ¶ 7 (stating that he became aware, in the course of being represented by Kempton, that Kempton had "discussed the Casa Lupita charges with Tommy [Morris]" at Morris's arraignment). Even if petitioner's allegations are believed, there has been no showing that Kempton's prior contacts with Morris relating to the robbery charges at issue here affected his subsequent representation of Mannhalt in the slightest degree.

Kempton had also apparently previously represented Morris in an unrelated criminal proceeding. Hansen Affidavit at App. C-90 (testimony of Morris). There is no evidence, however, that this prior relationship adversely affected Kempton's representation of petitioner or prejudiced petitioner in any way.

thetical." *United States v. Mers*, 701 F.2d 1321, 1328 (11th Cir. 1983) (quoting Comment, *Conflict of Interests in Multiple Representation of Criminal Co-Defendants*, 68 J.Crim.L. & Criminology 226, 232 (1977)).

Throughout the period during the Kempton represented Mannhalt, Kempton had an interest in preserving his own reputation and avoiding criminal prosecution which was potentially in conflict with Mannhalt's desire to be defended against the criminal charges he was facing.[4]

To determine whether this potential conflict became an active conflict, this court must examine the precise circumstances of Kempton's representation. If, at any time during that representation, Kempton was forced to make a choice between his own, and Mannhalt's best interest, an actual conflict existed. *Mers, supra.*

If an actual conflict existed, the court must determine whether the conflict adversely affected Kempton's performance. *Cuyler, supra.* If at no point did an actual conflict adversely affect Kempton's performance, petitioner's motion for summary judgment based upon his Sixth Amendment claim must be denied and the government's motion for summary judgment on that claim granted.

III.
ACTUAL CONFLICTS

A. Failure to Consider a Plea Bargain

Prosecuting attorney Duane Evans, one of the prosecutors in petitioner's case, was "terribly interested" in Morris's accusation against Kempton. Hansen Affidavit at App. A-42. He "leaned on" the police to investigate the accusation, and, was willing to "maybe even turn the tables and offer Guenter [Mannhalt] a deal" in exchange for evidence against Kempton. Hansen Affidavit at App. A-43, 64.

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[4]Although, as the government states, Kempton had been told prior to Mannhalt's trial that he was no longer suspected of purchasing a stolen ring and bracelet, Kempton retained a strong interest in protecting his reputation and in preventing information from emerging which might lead to a renewed investigation.

Petitioner argues that Kempton's self-interest would have prevented Kempton, prior to Mannhalt's trial, from negotiating or even considering any plea bargain that would have allowed Mannhalt to be questioned by prosecutors about Kempton's purchases of jewelry. Petitioner argues that prejudice to Mannhalt must be presumed in this situation, because, as noted in *Holloway v. Arkansas*, 435 U.S. 475, 491 (1978), courts cannot feasibly assess the impact of a conflict of interest on any attorney's options, tactics, and decisions in plea negotiations.

Petitioner has made no showing, however, that the prosecuting attorneys ever offered a deal to Mannhalt such as the one discussed, nor that such an offer would have been made had Mannhalt been represented by other counsel. Since no such offer was made, the potential conflict of interest between Kempton and Mannhalt never reached the level of an actual conflict of interest.

Furthermore, Mannhalt makes it clear that he at no time possessed any information which might have incriminated Kempton. Although Mannhalt told Morris that Kempton had purchased a ring and bracelet, Mannhalt claims that he actually sold Kempton a gold watch for $1,200. Mannhalt Affidavit, ¶ 4.[5]. Morris' allegation was never independently corroborated, and the watch Kempton purchased was never identified as being the result of a robbery. Hansen Affidavit at App. A-45.

Evans would only have been willing to "offer Guenter [Mannhalt] a deal" if Mannhalt could have provided him with incriminating information against Kempton. Instead, the only information Mannhalt possessed would have exonerated Kempton. Although an actual conflict between Kempton and his client would have existed had Mannhalt been given the opportunity to help himself by incriminating Kempton, Mannhalt would not have been able to take advantage of such a deal no matter who was representing him.

Because the government never offered Mannhalt a plea

[5]Kempton describes this purchase somewhat differently in his Second Affidavit, p. 7 (describing purchase of a gold watch for $1,000).

bargain, no actual conflict of interest between Kempton and Mannhalt regarding the possibility of plea negotiations existed. Had such an offer been made, Mannhalt would have been unable to accept it due to his lack of information incriminating Kempton. Mannhalt therefore suffered no adverse affect during the plea negotiation stage as a result of the fact that Kempton represented him.

B. Cross-Examination of Morris

Morris was a major prosecution witness against Mannhalt. During Kempton's cross-examination of Morris, Kempton asked Morris about Morris's allegation that Kempton had purchased a stolen ring and bracelet. Despite Kempton's assertion that Morris was lying, Morris repeated the allegation, stated that Kempton had purchased the ring for Kempton's wife, and added that the ring was "nothing but some glass." Kempton then asked his wife to walk up to the front of the courtroom and show her rings to the court in order to disprove Morris' allegation.[6]

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[6]This portion of the cross-examination went as follows:

Q: (by James Kempton): Well, Tom, you told the police a lot of phony stuff to save your skin, didn't you?

A: (by Tommy Morris): No, sure didn't.

Q: Didn't lie to them at all?

A: No.

Q: Tell you what, Tommy, would you just tell the jury now like you told the police about the stolen ring I bought with a hundred bills?

A: You did.

Q: I did?

A: Sure you did.

Q: Let's just hear about it. What kind of ring was it?

A: I don't know. You bought a ring.

Q: I bought a ring?

A: With a hundred bills. I was there.

Q: You were there?

A: Yeah. I didn't see you get the ring, but I was sitting in there when he came back in from selling you that ring in your car. Now, say I wasn't there. Now, you say I wasn't there, because you did.

Q: Well, I checked my car, so —

A: You bought it for your wife. You did.

Q: I bought a diamond ring from your wife?

A: For your wife.

By all accounts, Kempton's cross-examination was emotional and unorthodox.[7] Kempton admits that he was "visibly shaken" and "furious," when cross-examining Morris regarding the accusation, and explained that the court "cannot appreciate the furor [sic] one feels when being confronted by an absolute thieving liar and saying that one is the purchaser of stolen items." Second Kempton Affidavid, p. 11.

Petitioner argues that Kempton's conduct was improper and outrageous, that it was motivated not out of concern for Mannhalt's defense but out of concern for Kempton's reputation, and that the conduct adversely affected Mannhalt's defense.

Once Morris's stolen ring accusation had been brought out on cross-examination, Kempton and Mannhalt had the same goal, which was to undermine Morris's

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Q: For my wife? What's it look like?

A: It was a ring that was no good. It was nothing but some glass. But you bought it, you got it for twelve hundred dollars. You have it checked when you go home.

Q: Twelve hundred dollars?

A: That's right. You go have it checked. You ain't got nothing but some glass.

Q: My wife's here now.

A: Yeah.

Mr. Kempton (to the spectator's section): Come up here, will you? Are you wearing any rings?

Unidentified spectator: Yes. I hope they're not glass.

Mr. Redkey: Your Honor, I'm going to object to this line of questioning —

Mr. Kempton: No, he's telling the police I'm buying stolen goods. I'm proving he's a liar.

A: How can you prove that I'm a liar on that? How?

Q: Just listening to you, Tommy.

The Court: Things are coming a little unglued here, a little bit out of order.

Q: You just like to put it wherever you can, don't you?

A: Just like you, just like you.

Hansen Affidavit at App. C-102-104.

[7]Prosecuting attorney William Redkey stated, "I had certainly never seen anything like [Kempton calling his wife forward from the back of the courtroom] occur in a court of law, nor have I since," and called Kempton's behavior "irregular," "unusual," and "out of control." Hansen Affidavit at App. B-39-40.

credibility. The question before the court, therefore, is whether Kempton and Mannhalt had conflicting interests regarding the wisdom of asking Morris about the accusation at all.

Petitioner's theory is that Kempton's interest in vindicating his own reputation led him to ask Morris about the accusation, while it was in Mannhalt's best interest to avoid any mention of further allegations against him. The court cannot see, however, how Kempton's interest in his own reputation would have led him to air publicly for the first time Morris's defamatory allegations. Instead, the court finds that Kempton's personal interest would have been best served by avoiding any mention of Morris's accusation.[8]

In addition, it is not clear that it was against Mannhalt's interest to bring out Morris's accusation on cross-examination. Kempton has stated that his decision to cross-examine Morris regarding Morris's allegation was made in response to his fear that Morris would bring up the allegation while being examined on redirect.[9] Kempton also states that he tried to make the best of what he concedes was a "bad" situation, and hoped through his cross-examination to further discredit Morris's testimony. Kempton Affidavit, p. 3. Petitioner does not argue, and the court does not find, that Kempton's explanation is inherently implausible or unwise, or that no reasonably competent and conflict-free attorney would have chosen to bring up

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[8]The court finds incredible the suggestion that Kempton bought out Morris's accusation against him on cross-examination solely to publicly discredit that accusation and restore his own, at that time untarnished, reputation.

[9]Kempton states:

> [P]etitioner and I knew that Tommy [Morris]'s allegation was in the police report and was lurking there, so to speak, with the possibility that he might bring it out in trial. My lengthy trial experience has been that if something bad is likely to come out, it's best if I bring it out, rather than the opposition.
>
> * * * *
>
> [I]t was mutually agreed that [bringing out Morris's allegation on cross-examination] was a good tactical approach to what might have been an awkward or embarassing situation.

Kempton affidavit, pp. 3 & 4 (emphasis added).

the fact that Morris had leveled this accusation against Mannhalt and Mannhalt's defense attorney.

Because the court cannot conclude either (1) that it was in Kempton's best interest, actual or perceived, to bring out Morris's accusation on cross-examination, or (2) that it was against Mannhalt's interests to do the same, the court finds no evidence that an actual conflict of interest between Kempton and Mannhalt existed during Kempton's cross-examination of Morris or adversely affected that cross-examination.

C. Examination of Mannhalt

Petitioner argues that, having brought out Morris' accusation that Mannhalt had sold a stolen ring and bracelet, Kempton should have asked about that accusation during his two-and-a-half days of direct examination of Mannhalt. Petitioner suggests that the only reason Kempton did *not* ask Mannhalt about Morris's accusation was Kempton's concern that the prosecution would, on cross-examination, elicit from Mannhalt the fact that Kempton had purchased a watch from him. Petitioner further suggests that Kempton's concern for his reputation gave him a personal interest in seeing that this information was not brought out in open court, even though such testimony would have benefited Mannhalt.

Kempton states that Mannhalt was not asked about the Morris accusation because "[n]either Mr. Mannhalt, my associate Ms. Youngblood, nor myself felt that we needed any further efforts to refute Tommie [Morris]'s accusation because we were all confident that the jury did not believe one word he had said on any subject." Second Kempton Affidavit, p. 15.[10]

In assessing attorney performance, every effort must be made "to eliminate the distorting affect of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland, supra*, 466 U.S. at 689. There

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[10] Neither Mannhalt nor Youngblood addressed this question in their affidavits.

is nothing implausible or unreasonable about Kempton's stated reason for declining to ask Mannhalt about Morris's accusation.

Furthermore, the testimony by Mannhalt that Kempton allegedly feared—that Mannhalt had in fact sold an item of jewelry to Kempton—would have also tended to restore Morris's credibility and been injurious to Mannhalt. There was therefore no conflict of interest between Kempton and Mannhalt relating to the question of whether to pursue Morris's accusation on direct examination of Mannhalt.

Although a potential conflict of interest as to the desirability of asking Mannhalt about the Morris accusation on direct examination may have existed, the court cannot conclude either (1) that Kempton's and Mannhalt's interests were actually in opposition, (2) that Kempton's failure to question Mannhalt regarding the accusation was caused by the alleged conflict of interest between Mannhalt and Kempton, or (3) that this failure adversely affected Kempton's representation or Mannhalt's defense.[11]

D. **Failure of Kempton to Testify**

Petitioner argues that because Kempton could have testified that Mannhalt did not sell him a stolen ring or bracelet, Kempton should have disqualified himself from representing Mannhalt in order to be available to testify on Mannhalt's behalf.

The government did not charge petitioner with selling a stolen ring or bracelet to Kempton, nor did it present evidence relating to such a charge. Instead, Kempton brought out Morris' allegation regarding such a sale for impeach-

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[11] This situation is distinguishable from *United States v. Iorizzo*, 786 F.2d 52 (2nd Cir. 1986), relied upon by petitioner. In *Iorizzo* trial counsel had previously represented an important prosecution witness at a State Tax Commission hearing. This witness' previous testimony under oath was clearly relevant to the testimony he gave at trial. Counsel agreed to refrain from impeaching the witness with this prior testimony because of counsel's role in preparing that testimony. The court held that defense counsel was led, by this conflict of interest, to forego an important line of inquiry, one whose exclusion by the court on grounds of relevance would have been reversible error. 786 F.2d at 57. Petitioner has made no such showing here.

ment purposes on cross-examination. Morris's allegation, and Kempton's potential testimony, was therefore collateral to facts at issue at Mannhalt's trial.

The trial court has discretion to permit a cross-examiner to inquire into collateral matters testing the credibility of a witness, but the cross-examiner may not present evidence to show that the answers given are false. *State v. Anderson*, 46 Wn.2d 864, 285 P.2d 879 (1955); *State v. Lahti*, 23 Wn.App. 648, 649-50, 597 P.2d 937 (1979). While it was therefore acceptable for Kempton to attempt to impeach Morris's testimony by inquiring about his prior accusation, testimony by Kempton refuting Morris's testimony on this collateral issue would not have been admissible.

For this reason, any conflict which existed between Kempton's role as defense attorney and Kempton's potential role as defense witness had no adverse affect on Mannhalt's defense.

E. General Ineffectiveness

Petitioner argues that Kempton's cross-examination of Morris was performed in an emotional and inappropriate manner that could not have failed to diminish his effectiveness. Petitioner also argues that, were it not for Kempton's personal involvement, Kempton would have (1) refrained from bringing out Morris's accusation on cross-examination, and (2) questioned Mannhalt about Morris's accusation.

The court has determined that Kempton did not at any time suffer from an actual conflict between his interests and the interests of his client. The court must therefore evaluate Kempton's emotional or unconventional behavior under the traditional test for ineffective assistance of counsel.[12] Petitioner must show (1) that Kempton's perform-

[12] This in an important distinction. In many cases, the underlying cause of an attorney's allegedly ineffective representation is the fact that the attorney is torn between his duty to provide competent representation to his client and another duty or desire. For example, an attorney may render ineffective representation because of an excessive caseload or a personal crisis. To characterize all such causes as "conflicts of interest," allowing any subsequent conviction to be reversed if the

ance was deficient, and (2) that Kempton's deficient performance prejudiced Mannhalt's defense. *Strickland, supra*, 466 U.S. at 687.

1. **Deficient Performance**

For Kempton's performance to have been legally deficient, he must have made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland, supra*, 466 U.S. at 687. The court must strongly presume that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id.* at 689.

The court has already determined that Kempton's decisions to (1) bring out Morris's accusation on cross-examination, and (2) refrain from questioning Mannhalt about Morris's accusation fell within the range of reasonable professional assistance. The court similarly finds that Kempton's manner of conducting his cross-examination could be considered sound trial strategy and therefore fell within the range of reasonable professional assistance.

2. **Prejudice**

Where a claim of ineffective assistance of counsel is based on something other than a conflict of interest, reversal is appropriate only if prejudice is shown. Prejudice exists only if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland, supra*, 466 U.S. at 694.

Petitioner argues that, because of Kempton's behavior, the question of petitioner's guilt or innocence became intertwined with the matter of Kempton's honesty and in-

---

"conflict" had an adverse affect on counsel's performance, would eviscerate the holding in *Strickland, supra*, that "an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." 466 U.S. at 691.

tegrity. Petitioner also argues that because neither Kempton nor Mannhalt subsequently testified to rebut Morris's assertion, the jury may have believed Morris's statement that Mannhalt had sold a stolen ring and bracelet. Petitioner finally notes that Morris's accusation against Kempton was especially credible, and therefore adverse to Mannhalt, because Kempton's prior relationship with Morris had previously been brought to the jury's attention.[13]

The government disagrees, contending that review of the trial record indicates the effectiveness of Kempton's cross-examination strategy. The government also suggests that the jury's "not guilty" verdicts on four counts indicate that the jury completely discounted Morris's testimony.

A review of the record reveals no reasonable probability that the outcome of Mannhalt's trial would have been different had it not been for Kempton's alleged ineffectiveness. Reversal is therefore not appropriate, even if petitioner's analysis of the negative effect of Kempton's conduct is accepted. *Strickland, supra*, 466 U.S at 687.

IV. CONCLUSION

Petitioner has failed to show that an actual conflict of interest between Kempton and Mannhalt adversely af-

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[13] *See* Hansen Affidavit at App. C-89-90:

Q (Kempton): Well, you just tell me what overcame you to decide to be so honest that they couldn't convict you of some robberies.

A (Morris): If I would've had some hope I probably wouldn't have admitted to it.

Q: I see.

A: I couldn't afford no fancy lawyer like you. See what I'm saying? I couldn't afford you. You was at my arraignment, don't you remember? I couldn't afford you. I didn't have no help, didn't have you money. Don't you remember?

Q: I remember that.

A: I didn't have no money. A fancy lawyer like you, shoot, I'd of stuck right in there, but I can't afford you. * * *

Q: You got a fancy lawyer, too, didn't you?

A: No, he's not special like you.

Q: What makes you think I'm special?

A: Oh, I had you one time before.

Q: That was so long ago I can't even remember.

A: The price's done really skyrocketed now.

fected Mannhalt's defense.[14] Petitioner also failed to show that Mannhalt suffered prejudice stemming from ineffective representation by Kempton.

IT IS NOW, therefore, ordered as follows:

Defendants' motion for summary judgment regarding petitioner's ineffective assistance of counsel claim is GRANTED. Plaintiff's motion for summary judgment on that claim is DENIED. Plaintiff's unconstitutional jury instruction claim is hereby referred to Magistrate Sweigert for preparation of a report and recommendation.

IT IS SO ORDERED.

The Clerk of the Court is directed to forward copies of this Order to counsel of record.

DATED at Seattle, Washington this 1st day of June, 1987.

BARBARA J. ROTHSTEIN
United States District Judge

[14] Therefore, the court does not reach the government's argument that Mannhalt waived any objection he might have had to Kempton's conflict of interest.

APPENDIX E

Count No.	Verdict	Place	Testimony by Morris	Taa	Kline	Sheeler
1	G	Conspiracy	——	——	——	——
II	NG	Royal Forks 45th	34-41		54-71	
III	NG	Royal Forks, Lake City, I			71-79	
IV	G	Royal Forks, Lake City, II			80-93	29-41
V	G	F.X. McRory's	41-55		94-112	45-65
VI	G	Vancouver's		55-67	112-118	
VII	NG	The Sanctuary	55-60		118-121	
VIII	G	Jake O'Shaughnessy's			121-128	
IX	G	Old Spaghetti Factory	60-62		128-132	65-70
X	G	Old Mulligan's		67-88	132-139	73-78; 83-86
XI	G	Hungry Turtle	60-62	89-104	132-145	86-94
XII	NG	Casa Lupita	63-75			95-101

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No. 88-332 (2)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

AMOS E. REED,

Petitioner,

v.

GUENTER MANNHALT,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RICHARD HANSEN
600 Pioneer Building
600 First Avenue
Seattle, WA 98104
(206) 447-9681

45pp

QUESTIONS PRESENTED

1. Whether a defense attorney in a criminal case has a conflict of interest where the State's primary witness against the defendant accused the defense attorney of being directly involved in the same criminal conduct for which the defendant is on trial.

2. Whether the fact that defense counsel did, in fact, pay $1,000 in cash to buy a gold watch from his client under circumstances similar to those alleged by the State's primary witness, created an additional conflict of interest in a prosecution alleging robbery and possession of stolen jewelry.

3. Whether the conflicts of interest described in paragraphs 1 and 2, above, "adversely affected (the) lawyer's performance" based upon any of the following factors, all of which occurred at the defendant's trial:

(a) Where the defense attorney, because of his representation of the defendant, was unavailable as a witness to rebut, deny or explain the allegations of illegal conduct made by the State's primary prosecution witness;

(b) Where the prosecution was seriously interested in prosecuting defense counsel and even in seeking the defendant's cooperation against his attorney, but was precluded from doing so because of the fact that defense counsel represented the defendant;

(c) Where defense counsel deliberately avoided asking his client, during the defendant's testimony, whether the allegation that counsel bought stolen property from the defendant was true;

(d) Where defense counsel engaged in a highly improper and inflammatory exhibition in front of the jury by cross-examining the State's primary witness about the allegation, and by calling his wife forward in the courtroom to ask her whether the jewelry she was wearing was stolen;

(e) Where defense counsel has admitted, and the prosecutors involved in the case have testified under oath, that defense counsel was personally

outraged and concerned about the allegation of his criminal conduct "ruining" his reputation as a lawyer.

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No. 88-332

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

AMOS E. REED,

Petitioner,

v.

GUENTER MANNHALT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE FACTS

The most significant and blatant omission in the State's Petition for Writ of Certiorari is the failure to quote even a single word from the relevant portions of the transcript of Respondent's trial.

Instead, the State conveniently chooses to rely upon the deposition testimony in federal court from the two prosecutors who tried the case against Respondent Mannhalt. These hindsight descriptions by the prosecutors who have a vested interest in upholding Respondent's convictions fail to do justice to the serious conflicts of interest that burdened defense counsel at trial and led to his outlandish behavior in front of the jury.

Respondent Mannhalt's alleged involvement in this series of robberies first came to light on November 7, 1980, when the State's primary witness, Tommy Morris, was arrested for a robbery that was eventually charged against Respondent. After his arrest, Mr. Morris tried to "cut a deal" for himself by volunteering to implicate Guenter Mannhalt in that crime and numerous others, according to the police report of Morris' post arrest

interview. See CR 27 (Appendix); ER 125 for a complete copy of this critical police report, which is quoted extensively below.

This police report documents conversations in which "the prosecutor would like to offer TDM (Tommy Morris) a lesser sentence if he would testify against GM (Guenter Mannhalt)." In another conversation, two hours later, Mr. Morris "agreed to testify against GM" but indicated that he "wants to walk from all charges if he testifies." In the same conversation, Morris volunteered to "identify some of the jewelry that is in evidence (the jewelry that came from GM's safe)," a reference to jewelry which later formed the basis for charges of robbery and possession of stolen property against Mannhalt, and which had been seized from the safe at his donut shop pursuant to a search warrant.

The next entry in this police report documents another conversation with Morris that occurred two days later and listed twelve cases of theft or robbery Morris and his cohorts committed, allegedly at the direction of Respondent Mannhalt, about which he volunteered to testify in exchange for leniency. One of these entries reads as follows:

> 11-9-80 1900 Hrs. - TDM to our office for further discussion. He will give information re the following:
>
> * * *
>
> 11. Attorney James Kempton purchased a stolen ring $1200 with $100 bills; taken from Lake Washington area. Also purchased a stolen bracelet.

As noted above, Morris agreed, as part of a generous plea bargain, to provide information not only against Guenter Mannhalt, but also against his attorney, James Kempton, who eventually represented Mannhalt in defense against all the charges Morris testified about.

The full extent and seriousness of attorney Kempton's conflict of interest blossomed at trial when Kempton cross-examined Morris extensively about Morris' accusation that Kempton had purchased stolen jewelry from Respondent Mannhalt, at the same donut shop where police seized the allegedly stolen property that formed the basis of the charges against petitioner in Counts XIII-XVI. Even though the State never asked Morris about the accusation on direct examination, Kempton brought it up on cross and asked Morris about the critical police report which contained Morris' accusation against Kempton. Kempton asked Morris whether he "told the police a lot of phony stuff to save your skin, didn't you?" To this, Morris answered "No, sure didn't." Id. at C-102, ER 102. The following, outrageous exchange then occurred:

> Q (by Kempton): Didn't lie to them at all?

A (by Morris): No.

Q: Tell you what, Tommy, would you just tell the jury now like you told the police about the stolen ring I bought with hundred dollar bills?

A: You did.

Q: I did?

A: Sure, you did.

Q: Let's just hear about it. What kind of ring was it?

A: I don't know. You bought a ring.

Q: I bought a ring?

A: With hundred dollar bills. I was there.

Q: You were there?

A: Yeah. I didn't see you get the ring, but I was sitting in there when he came back in from selling you that ring in your car. Now, say I wasn't there. Now, you say I wasn't there, because you did.

Q: Well, I checked my car, so--

A: You bought it for your wife. You did.

Q: I bought a diamond ring from your wife?

A: For your wife.

Q: For my wife? What's it look like?

A: It was a ring that was no good. It was nothing but some glass. You bought it, you got it for $1200. You have it checked when you go home.

Q: $1200?

A: That's right. You go have it checked. You ain't got nothing but some glass.

Q: My wife's here now.

A: Yeah.

Mr. Kempton (to the spectator's section): Come up here, will you? Are you wearing any rings?

Unidentified spectator: Yes. I hope they're not glass.

Mr. Redkey: Your Honor, I'm going to object to this line of questioning --

Mr. Kempton: No, he's telling the police I'm buying stolen goods. I'm proving he's a liar.[1]

A (by Morris): How can you prove that I'm a liar on that? How?

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[1]Of course, the jury was instructed that statements of counsel are not evidence in the case. Jury Instruction 53, CR 1, ER 43.

> Q: Just listen to you, Tommy.
>
> The Court: Things are coming a little unglued here, a bit out of order.
>
> Q (by Mr. Kempton): You just like to put it wherever you can, don't you?
>
> A: Just like you, just like you.
>
> Q: I'm going to stand up here and talk about stolen rings I bought for my wife, and I --
>
> A: Why wouldn't you? I'm not--

Id. at C-102-104, ER 102-104.

Kempton persisted in this cross-examination for several more pages, even to the point of waving the police report containing the accusation in front of the jury. Id. at 105-106, ER 105-106. Many of the above-quoted references were repeated, including a direct quote from the police report which Kempton read to the jury as follows: "Attorney James Kempton purchased a stolen ring, $1200 with hundred-dollar bills taken from the Lake Washington area." To which Morris responded: "That ain't

right. I said that, I did say that. I said that, though, I said that maybe two weeks ago. I said, 'yeah, he was walking around with a hot ring hisself.'" Id. at C-105-106, ER 105-106.

Morris then volunteered "every time I see you coming in you got something" following which Kempton asked "when did you see me in the Donut Shop?" to which Morris responded "you'd be surprised." Id. ER 108. Morris elaborated by providing details about the various times he saw Kempton at the donut shop where the jewelry in evidence had been seized, and he repeated once again his description of when he "seen (Kempton) drive up. I was standing right there looking at you. He went outside and came back in with $1200. He had the ring when he left, but he didn't have it when he came back. So that's what I thought, he said you did it." Id. at C-110, ER 110. This was followed by yet

another description of the entire scenario of Kempton buying stolen jewelry from Mannhalt, including his claim that the ring was a phony and that Kempton's wife was "going to be mad" when she found out. Id. at C-110, ER 110.

Prosecutors Evans and Redkey were both deposed in the habeas corpus proceeding below. In his deposition, Mr. Redkey described the foregoing exchange as follows:

> Well, that remark, by the judge, was made, I believe, at some point after my objection to Kempton calling his wife forward from the back of the courtroom, which I saw to be highly irregular conduct. I had certainly never seen anything like that occur in a court of law, nor have I since. It was clearly an unusual tactic. And I would say that the longer it continued, the more it did appear to be out of control, and I was trying to bring the trial judge's attention to that point, which he ultimately did. I think that is when he said things were coming unglued here; when we had a spectator commenting on the record, who was not a sworn

> witness, and counsel engaging in conversation with her.

Id. at B-39-40, ER 78-79. Redkey testified that Kempton's wife walked "right up toward the middle of the courtroom," and "raised her hand and displayed a diamond ring." Id. at B-40-42, ER 81.

Mr. Kempton himself admitted that "I did, perhaps, lose my composure . . . I was visibly shaken and I was furious. The court cannot appreciate the furor one feels when being confronted by an absolute thieving liar and saying that one is the purchaser of stolen items." ER 184.

In defense against the habeas corpus petition, the State submitted an affidavit from Mr. Kempton in which he admitted, for the first time ever, that he did purchase a gold watch for $1,000 from petitioner, at petitioner's donut shop, during the relevant time period described by Tommy Morris. Kempton Affidavit at p. 6, ER 179-180. In his affidavit, Kempton describes

it as "a gold Omega wristwatch which I thought was absolutely beautiful," and further states "I somehow recall Guenter saying it was a black pimp" who had provided the watch to Mannhalt. Interestingly, Kempton began his outrageous cross-examination of Tommy Morris, a black man, by asking "You're a pimp, aren't you, Tommy?" Trial transcript at 85, ER 85. Kempton states in his affidavit: "I asked him what he wanted for the watch and he said $1,000. I was taken aback but Guenter advised me it was a $2,000 watch." Kempton Affidavit at p. 6, ER 179.

REASONS FOR DENYING THE WRIT: CERTIORARI IS INAPPROPRIATE BECAUSE THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IS FUNDAMENTALLY CORRECT, WELL FOUNDED IN FACT, AND TOTALLY CONSISTENT WITH A LONG LINE OF DECISIONS FROM THIS COURT AND THE VARIOUS CIRCUIT COURTS OF APPEAL.

In its Petition, the State argues that the Ninth Circuit holding "is in direct conflict with the state of the law . . . and the pronouncements of the United States

Supreme Court." However, this assertion is nonsensical since the Ninth Circuit applied precisely the same legal standard to the undisputed facts of this case that Petitioner argues it should have applied. In its thoughtful and thorough decision, the court quoted and utilized this Court's well established legal standard from Strickland v. Washington, 466 U.S. 668, 692, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) that requires a new trial where defense counsel "actively represented conflicting interests" and where the conflicts "adversely affected his lawyer's performance," (quoting Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)). See Opinion at page A-7 of State's Petition.

The State also argues that the Ninth Circuit's holding "erroneously adopted a blanket rule that a conflict of interest automatically exists whenever an attorney

is accused of crimes similar or related to those of his client." On the contrary, the Ninth Circuit found four distinct ways that defendant Mannhalt demonstrated that the conflicts of interest "adversely affected his lawyer's performance":

> The second prong of Cuyler is whether the conflict adversely affected counsel's performance. Here, Morris' accusation against Kempton adversely affected Mannhalt's representation in four areas: (1) Kempton's failure to testify to rebut Morris' allegations, (2) Kempton's cross-examination of Morris, (3) Kempton's failure to question Mannhalt on direct about the allegations, and (4) Kempton's failure to explore possible plea bargains.

(See Opinion at page A-10 of State's Petition). These four factual findings are discussed in detail over the following several pages of the court's opinion, and are well supported by the record of the trial, as summarized above.

A. CONFLICT OF INTEREST

A defendant who "shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." Cuyler v. Sullivan, supra, at 349-50. Accord: Walberg v. Israel, 766 F.2d 1071, 1075 (7th Cir. 1985); Ruffin v. Kemp, 767 F.2d 748 (11th Cir. 1985).

In Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), this Court explained the reasons why prejudice need not be shown where a claim of ineffective assistance is based on defense counsel's conflict of interest with his client:

> . . .it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interest on the attorney's options, tactics and decision in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require,

> unlike most cases, unguided speculations.

Holloway v. Arkansas, supra, 435 U.S. at 490-91. Accord: Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); Government of Virgin Islands v. Zepp, 748 F.2d 125 (3rd Cir. 1984).

In Strickland v. Washington, supra, this Court noted that claims of ineffective assistance based upon conflict of interest give rise to a "limited, presumption of prejudice." Id. at 692. In explaining this presumption of prejudice the court set forth the following test:

> Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and "that an actual conflict of interest adversely affected his lawyer's performance."

Id., at 692 quoting Cuyler v. Sullivan, supra. The court justified a presumption of prejudice in these circumstances because:

> In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e.g., Fed. Rule Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest.

Id. (emphasis added).

The Ninth Circuit applied these well established legal standards to the facts of this case and concluded, quite correctly, that defense counsel Kempton "actively represented conflicting interests" which "adversely affected his . . . performance." These adverse effects are discussed below.

B. ADVERSE EFFECTS ON DEFENSE COUNSEL'S PERFORMANCE

(1) Defense Counsel Should Have Been Available As A Witness.

The Ninth Circuit found that: "First, Kempton should have disqualified himself so as to be available to testify and dispute Morris' testimony about the stolen ring." See App. to Petition at A-10. After discussing relevant Canons of the Ethics and pertinent case law, the Ninth Circuit made the following finding:

> Kempton's testimony may have been independently admissible to show Morris' motive - i.e. Morris was so desperate to get a plea bargain that he would even fabricate criminal conduct by Kempton. Moreover, Morris' accusations against Mannhalt and Kempton were factually intertwined. His accusations against both attorney and client were part of the same conversation with police officers and were documented in the same police report. In addition, Mannhalt was tried for possessing stolen property seized from his donut shop. Morris accused Kempton of buying stolen property at this same donut shop and Kempton admits that he bought a gold watch there.

> Even if Kempton's testimony would have been inadmissible, his cross-examination of Morris put his own and his wife's unsworn testimony before the jury. Kempton told the jury that he did not buy a stolen ring. Although the jury was instructed not to consider these comments as evidence, Kempton put himself in the position of arguing his own credibility, precisely what DR 5-102(A) seeks to avoid. Accord Iorizzo, 786 F.2d at 57 (whether or not attorney testified, his firsthand involvement would cause any argument to jury about testimony to be viewed as a statement of a witness as well as of an advocate).

Id. at A-11.

The Ninth Circuit's finding that Mr. Kempton should have been available to explain or deny the allegations Tommy Morris made against him is certainly correct. It is fundamental that any evidence tending to discredit a cooperating witness by showing his bias or motive to fabricate evidence against petitioner in order to protect himself would have been admissible. Davis v. Alaska, 415 U.S. 308,

94 S.Ct. 1105, 39 L.Ed.2d 34 (1974); Delaware v. Van Arsdall, 475 U.S. 673, 89 L.Ed.2d 674, 106 S.Ct. 1431 (1986). False statements by a prosecution witness would always be admissible, especially where they pertained to plea bargaining efforts to obtain leniency. Johnson v. Brewer, 521 F.2d 556 (8th Cir. 1975); United States v. Hitchman, 609 F.2d 1098 (5th Cir. 1979).

Provisions of the Code of Professional Responsibility require that defense counsel refuse employment or withdraw from any case where the attorney ought to be called as a witness. Canon Five dictates that "a lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness," subject to three exceptions which are not at all applicable to this case. DR 5-101. Disciplinary rule 5-102(A) dictates that counsel must withdraw if he learns, in

the course of the litigation, that he ought to become a witness:

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of a client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, . . .

except as provided in the same exceptions which, as noted, are not applicable here.

Ethical Consideration 5-9 elaborates upon the policy reasons behind this mandatory prohibition:

> An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

Ethical Consideration 5-10 notes that, "when the question arises, doubts should be resolved in favor of the lawyer testifying

and against his becoming or continuing as an advocate."

Numerous cases closely on point make it clear that, where defense counsel ought to have been available as a witness in defense of his client, a new trial must be ordered. United States v. Iorizzo, 786 F.2d 52 (2nd Cir. 1986) (cited and discussed by the Ninth Circuit below); Commonwealth v. Rondeau, 392 N.E.2d 1001 (Mass. 1979); Comden v. Superior Court of L.A. County, 145 Cal. Rptr. 9, 576 P.2d 971 (1978); United States v. DeLuna, 584 F. Supp. 139 (W.D.Nev. 1984); United States v. Snyder, 707 F.2d 139 (5th Cir. 1983); Government of Virgin Islands v. Zepp, supra; United States v. Kwang Fu Peng, 766 F.2d 82 (2nd Cir. 1985). See, generally, Developments in the Law, Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev., 1244 at 1289-1291 (1981) and 1776 Associates, Inc. v. Lazrus, 416 N.Y.S.2d

162 (1979); Norman Norell, Inc. v. Federated Department Stores, 450 F. Supp. 127 (S.D. N.Y. 1978); Eurocom, S.A. v. Mahoney, Cohen and Co., 522 F. Supp. 1179 (S.D. N.Y. 1981); MacArthur v. Bank of New York, 524 F. Supp. 1205 (S.D. N.Y. 1981).

Finally, the record clearly shows that Mannhalt was never advised of this conflict or its detrimental effects. As noted in the Ninth Circuit opinion:

> We add a final note. The prosecution here was fully aware before Mannhalt's trial began of Morris' accusation against Kempton. The prosecution, therefore, had ample opportunity to bring the potential conflict to the trial judge's attention and move for disqualification if appropriate. Such a process would have also enabled Mannhalt if he so desired to waive any conflict on the record after adequate warning. We trust that this opinion will ensure a pretrial disposition of such conflict of interest issues in the future.

Petition at A-10 to A-11.

(2) Failure to Question Defendant About the Accusation.

The Ninth Circuit found another adverse effect on defense counsel's performance based on the following:

> Third, having brought out Morris' accusation on cross, Kempton could have asked Mannhalt about it on direct examination. Mannhalt suggests Kempton did not do so because he feared the prosecution would elicit on cross that Kempton had purchased a watch from Mannhalt. Kempton claims that Morris had been so thoroughly discredited that no further refutation was necessary.
>
> After reviewing the cross-examination, we are not convinced that refutation by Mannhalt was unnecessary. As noted above, the jury could have inferred from Kempton's emotional cross-examination that Morris' accusation was true. This impression may have been bolstered by the fact that neither Kempton nor Mannhalt denied the allegation in sworn testimony. Kempton's decision not to question Mannhalt thus may have been affected by Kempton's personal concerns.

Petition at A-12. Kempton had good cause to be worried about the effect of questioning his client about his purchase

of jewelry at Mannhalt's donut shop. Such questions would have embarrassed Kempton professionally or even subjected him to prosecution.

(3) Defense Counsel's Concern as a Potential Suspect Affected His Actions in Plea Negotiations.

The Ninth Circuit made the following finding:

> Finally, because Kempton was the target of the same criminal investigation, he may not have pursued a plea bargain in which Mannhalt would agree to testify against Kempton. Exploring possible plea negotiations is an important part of providing adequate representation of a criminal client, and this part is easily precluded by a conflict of interest. See Holloway v. Arkansas, 435 U.S. 475, 490-91 (1978)

Petition at A-12. Obviously, defense counsel Kempton had strong personal interests that arose from Tommy Morris' accusation and conflicted with those of Respondent Mannhalt. First, and foremost, he was an actual target of the same criminal investigation against his client.

This was verified by state prosecutor Duane Evans at his deposition:

> First, when I was made aware of this (Morris' accusation against Kempton), I went, "Bingo." And I will not go into this in great length but, clearly, I had been told for many years previous that your client was an important fence. You could sit outside and see stuff go in. One of the big questions everybody has always had was where did it go? You know, very simple.
>
> Well, if you could show that he had a clientele of upper-class, professional people in town, that would explain a lot of things. So, as a prosecutor, I was terribly interested in this piece of information. And I cannot speak for the police, I have no idea, but I know I leaned on them hard to do everything they could to chase that down, put it to rest, one way or the other.

Richard Hansen Affidavit at App. A-42-43 (testimony of Duane Evans, emphasis added), CR 26, ER 66.

At his deposition Evans made it clear that he would have prosecuted Kempton if at all possible, even if this required

"turn[ing] the tables and offer[ing] Guenter (Mannhalt) a deal":

> Q: Mr. Evans, relative to Mr. Morris' accusation against Mr. Kempton, did you ever see that as a conflict of interest for Mr. Kempton?
>
> A: Initially, I did. Clearly, if there was any merit to it, he could not -- number one, he was going to get prosecuted if I could corroborate, maybe even turn the tables and offer Guenter a deal. Look, and this is straight, I would have done so. Maybe not against all the charges, but we would have made some accommodation. But so, yes, there was a potential conflict there, . . .

Hansen Affidavit at App. C-64, CR 26, ER 70 (emphasis added).

Plea bargaining has been recognized as "an essential component of the administration of justice." Santobello v. New York, 404 U.S. 257, 260, 30 L.Ed.2d 427, 432, 92 S.Ct. 495, 498 (1971). This Court has clearly held that the requirements for effective assistance of counsel extend to the plea bargaining

process. Hill v. Lockhart, 474 U.S. 52, 88 L.Ed.2d 203, 209, 106 S.Ct. 366, 370 (1985). See also, Johnson v. Duckworth, 793 F.2d 898 899 (7th Cir. 1986). The mere failure to advise a client of a plea bargain offer constitutes ineffective assistance of counsel. See Johnson v. Duckworth, supra, United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 438 (3rd Cir. 1982); United States ex rel. Simon v. Murphy, 349 F. Supp. 818 (E.D. Pa. 1972); People v. Brown, 177 Cal. App. 3d 537, 223 Cal. Rptr. 66 (1986); State v. Simmons, 65 N.C. App. 294, 309 S.E.2d 493 (1983); Harris v. State, 437 N.E.2d 44, 45-46 (Ind. 1982); Commonwealth v. Napper, 254 Pa. Super. 54, 385 A.2d 521, 10 A.L.R.4th 1 (1978); see generally Annot., Adequacy of Defense Counsel's Representation of Criminal Client Regarding Plea Bargaining, 8 A.L.R.4th 660 (1981). The standard is whether there is a reasonable probability

that but for an attorney's error, a defendant would have accepted a plea agreement. Hill v. Lockhart, supra.

In Holloway v. Arkansas, supra, 435 U.S. at 490-491 this Court specifically noted that "to assess the impact of a conflict of interest on the attorney's option tactics and decisions in plea negotiations would be virtually impossible." (Emphasis added). However, the record in this case does make it obvious that petitioner's counsel had a strong incentive to prevent any such plea negotiations to protect himself at the expense of his client. A more serious conflict of interest could not be imagined.

In United States v. McLain, 823 F.2d 1457 (11th Cir. 1987) the court reversed the RICO, conspiracy, extortion, and drug convictions against several defendants because the defendant discovered, after his conviction, that his attorney was under

investigation for two HOBBS Act violations before and during Sher's trial. Although the attorney was not indicted until after the defendant had been convicted, the defendant argued on appeal that his attorney's knowledge that he was under investigation "created a conflict of interest, which reduced Johnson's effectiveness as Sher's counsel, thereby depriving Sher of his Sixth Amendment rights." 823 F.2d at 1463. The court concluded: "We find that an actual conflict of interest did exist . . . Although Johnson (the attorney) testified that he was not worried about the investigation, his client, having hired Johnson for his sterling reputation would have reacted differently." Id. at 1464. The court noted there was a "conflict between his (the attorney's) desires to aid his client and save himself," and specifically noted that:

> Johnson's competence was most lacking in the area of plea negotiations.
>
> * * *
>
> Exploring possible plea negotiations is an important part of providing adequate representation of a criminal client, and this part is easily precluded by a conflict of interest. Holloway v. Arkansas, 435 U.S. 475, 490, 98 S.Ct. 1173, 1181, 55 L.Ed.2d 426 (1978). Although the Justice Department's response to this possible action on Sher's behalf is uncertain, the fact that Sher was neither informed of Johnson's conflict of interest, nor counseled toward this avenue of plea negotiations should be weighed in Sher's favor.

823 F.2d at 1464. Accord: Government of Virgin Islands v. Zepp, supra.

Moreover, "the general competence" of a lawyer is irrelevant in any case where the claim of ineffective assistance is based on a conflict of interest. Zepp, 748 F.2d at 2165. Accord: United States v. Cancilla, 725 F.2d 867 (2nd Cir. 1984) (defendant's Sixth Amendment right to effective assistance of counsel violated

per se where defense counsel may have engaged in criminal conduct related to the conduct for which defendant was on trial); United States v. Kwang Fu Peng, supra, (prosecution witness, on cross-examination, accused defense counsel of threatening him during a post-indictment meeting); United States v. Salinas, 618 F.2d 1092 (5th Cir. 1980) (attorney was potential "target" of investigation regarding events for which the defendant had been indicted). Uniformly, courts have held that defense counsel must be disqualified in any case where he is accused of misconduct. United States v. Cunningham, 672 F.2d 1064 (2d Cir. 1982), United States v. Hobson, 672 F.2d 825 (11th Cir. 1982), United States v. Castellano, 610 F. Supp. 1151 (S.D.N.Y. 1985).

(4) Defense Counsel's Concern About His Reputation Caused His Outrageous Behavior.

The Ninth Circuit found another adverse impact on defense counsel's performance based on the following:

> Once Kempton decided to question Morris, both he and Mannhalt had an interest in undermining Morris' credibility. The manner of the cross-examination indicated, however, that Kempton was motivated, at least in part, by personal concerns. The examination was by all accounts unorthodox. Kempton admitted that he was shaken and furious. Kempton's emotional performance may have effectively discredited Morris in the eyes of the jury. It is equally likely, however, that the jury viewed Kempton's anger as implying that Kempton and possibly his client were involved in illegal conduct. Kempton's personal feelings about Morris' allegation may have thus adversely affected his performance.

Petition at A-12. In defense counsel Kempton's own affidavit he stated: "The court cannot appreciate the furor one feels when being confronted by an absolute thieving liar and saying that one is the

purchaser of stolen items." Kempton Affidavit at p. 11, ER 184. His associate, Deborah Youngblood, stated "Mr. Kempton was upset and angry that he was being implicated." CR 27, ER 22.

Even the prosecutors testified that Mr. Kempton was extremely upset and concerned about the effect the accusation would have on his reputation:

> And Kempton was, as I recall, trying to reinforce his allegation that Morris was a liar by saying, you know, "I know he's a liar. I have personal knowledge he's a liar, because I didn't buy that stolen ring, or at least not with knowledge that it was stolen."
>
> I think, also, that Jim Kempton later asked me whether I believed the allegation. I think he was concerned about his reputation that this allegation would be made, and did I believe it.

Richard Hansen Affidavit at App. B-52 (testimony of Bill Redkey), CR 26, ER 83. Prosecutor Evans testified that Kempton stated: "God, won't that ever go away," and "It's absolute hogwash." Id. at 55, CR

26, ER 69. According to Evans: "At some point in time, there was a 'you son of a bitch, you are going to ruin my reputation,' and I said, 'yes, but I am required under Brady to give you that, don't you understand that. I have to give it to you.'" Id. at 55, CR 26, ER 69.

Whenever an attorney has made a choice between alternative courses of action based upon considerations other than the best interests of his client, a new trial must be ordered. United States v. Mers, 701 F.2d 1321, 1328 (11th Cir. 1983). When the choice involves a conflict between the interests of the attorney and his client, the situation is intolerable.

II. CONCLUSION

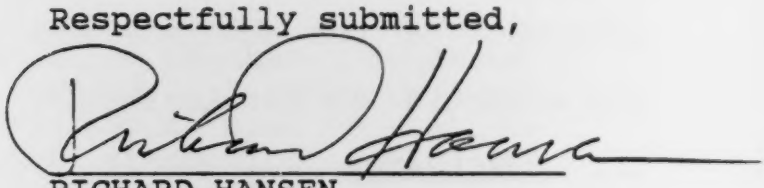
Contrary to the State's argument, the Ninth Circuit did apply the well established test for ineffective assistance of counsel based upon a conflict of interest, as set forth in Cuyler v.

Sullivan, supra. Moreover, the Ninth Circuit found a compelling factual basis to support its conclusion that defense counsel's conflict of interest had at least four actual and well documented adverse influences on the attorney's performance at trial.

Accordingly, this case presents neither a factual nor legal basis to justify review by the United States Supreme Court, and the Petition should therefore be summarily denied.

DATED this 21st day of September, 1988.

Respectfully submitted,



RICHARD HANSEN
Attorney for Respondent